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McMichael v. *Davidson*, 53.

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AGENT.

1. Where notes given for the price of a tract of land are left in deposit with the notary by whom the act of sale was drawn up, the notes or their proceeds to be delivered to the vendor when the property sold shall be released from certain incumbrances, and the notary places them in a bank for collection, and suffers them to remain there after the bank had suspended specie payments, until the makers paid them in the depreciated notes of the bank, he will be responsible to the vendor for the full amount of the notes.

Dupeux v. *His Creditors*, 242.

2. The master and others employed in the navigation of a vessel, though servants of the owners in different grades of authority, are competent witnesses for their employers. A witness is not incompetent because he is, or has been in the employment of the party who calls him.

Randall v. *Laguerenne*, 327.

3. A principal is bound by the representations of his agent made in the transaction of the business of his employer. *Hills* v. *Jacobs*, 406.

4. As a general principle, corporations are responsible for the acts of their agents; but they are not liable for every act of the persons in their employ-

ment. Where an agent acting in the capacity bestowed on him by a corporation, under the directions of his employers, or in the discharge of some duty incidental to his situation, does any act which causes damage to another, the corporation will be responsible; *aliter* where an act is done by him of his own free will, without reference to his functions as an agent. Thus a bank cannot be made liable in damages for an unauthorized declaration made by one of its officers, that plaintiff had frequently overdrawn his account. C. C. 430, 431, 433, 434. *Etting* v. *Commercial Bank*, 459.

5. An action by the stockholders against the directors of a bank for damages for losses sustained through their negligence, fraud or mismanagement, is prescribed by ten years from the date of the acts complained of.

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APPEAL.

I. *From what Judgments an Appeal will lie.*
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IV. *Citation of Appellee.*
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I. *From what Judgments an Appeal will lie.*

1. No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a *fi. fa.*, issued after the commencement of the insolvent proceedings. *Per Curiam:* The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the *tableau* of distribution. Its only effect is to place the property in the hands of the syndic to be administered. *Jacobs* v. *Bogart*, 162.

2. An appeal will lie from a judgment making absolute a rule to show cause why certain property, purchased by defendant at a judicial sale, but not paid for according to the terms of the adjudication, should not be re-sold at his risk. The judgment, if executed, may work an irreparable injury, for the

re-sale of the property might place it in other hands from which the reversal of the judgment below could not displace it. *Andry* v. *Fourchy*, 232.

3. The Legislature having made no provision for the exercise of criminal jurisdiction by the Supreme Court, and the court having repeatedly declined to assume it, the question can no longer be considered as an open one. *State* v. *Williams*, 252.

4. The first section of the statute of 29 January, 1817, forbidding the introduction into this State of slaves convicted of certain crimes, and denouncing a fine of five hundred dollars for every slave brought into the State in violation of its provisions and the forfeiture of the slave, one-half for the use of the State and the other half for the use of the informer, creates an indictable offence; and where the proceedings against one charged with a violation of the statute were by indictment, no appeal will lie from a sentence pronounced on the verdict of a jury, declaring the slaves so imported to be forfeited, and condemning the offender to pay the fine imposed by the statute and the costs, and to stand committed until they are paid. *Ibid.*

5. A plaintiff, who instead of submitting his case to the jury on the evidence received, moves for a nonsuit with leave to set it aside, may appeal from a decision of the court refusing to set aside the nonsuit and grant a new trial. *Per Curiam:* Such a mode of proceeding is a convenient way of bringing up for the decision of the Supreme Court incidental questions, without going into a trial on the merits of the case. *Clossman* v. *Barbancey*, 438.

6. An order having been granted enjoining defendants from obstructing a passage way alleged to be necessary to the use of houses belonging to the plaintiff, the latter subsequently took a rule on defendants to show cause why the obstructions which prevented the free use of his property should not be immediately removed at their expense. Plaintiff having appealed from a judgment refusing to order the removal of the obstructions until the case could be tried on the merits, on a motion to dismiss the appeal on the ground that the judgment was not a final one, nor the injury irreparable: *Held*, that an appeal will lie; that the judgment is final so far as it relates to the immediate removal of the obstructions; that it is not indispensably necessary to entitle a party to appeal from an interlocutory judgment, that the injury should be absolutely irreparable, it being sufficient that it may become so; and that the obstruction of a passage, by which a party can get in or out of his house is, in its immediate consequences, so serious an injury, as to be considered irreparable. *M'Donogh* v. *Calloway*, 442.

7. A judgment is incohate only, and no appeal lies from it, until signed by the judge. *Mechanics and Traders Bank* v. *Walton*, 451.

II. *Appeal Bond.*

8. Where an appellant fails to comply with the condition on which an appeal was allowed, by not giving bond within the time during which an appeal may be taken, the judgment will become *res judicata*. *City Bank* v. *Kent*, 60.

III. *Process to Compel the Allowance of an Appeal.*

9. Where the judge of an inferior court refuses obedience to an order of the Supreme Court directing him to allow an appeal, he may be committed to prison until he complies with such order. *State* v. *Williams*, 252.

IV. *Citation of Appellee.*

10. An irregularity in the service of citation of appeal on one appellee, will not authorize the dismissal of the appeal on his motion, much less on that of his co-appellee. *Whittemore* v. *Watts*, 10.

V. *Record of Appeal.*

11. Where the certificate of the clerk states that the record contains copies of all the documents on file, and a complete transcript of all the proceedings had and of all the testimony adduced on the trial, it is sufficient.
Whittemore v. *Watts*, 10.

12. Where on an appeal from a judgment confirming one taken by default, the record contains no statement of facts, and the certificate of the clerk shows that parol evidence was produced on the trial, but not taken down in writing, it will be presumed that plaintiff's claim was proved by legal evidence before the judgment by default was made final.
Landry v. *Jefferson College*, 179.

13. Where the testimony introduced on the trial has not been taken down in writing, the party intending to appeal must require the adverse party, or his counsel, to draw, jointly with him, a statement of the facts proved, to be annexed to the record. C. P. 602. It is only when the other party refuses to join in making out such a statement, or when the parties cannot agree, that the party intending to appeal has a right to call upon the court for a statement of facts. C. P. 603. *Ibid.*

14. Where the facts of a case appear only from a statement made by the judge, and there is no assignment of error or bill of exceptions, no point of law can be examined which does not arise from the facts stated by the judge; nor can the allegation of any fact not found in such statement be attended to. *Halsey* v. *Voorhees*, 355.

15. Proceedings in the court from which an appeal has been taken, had subsequently to the judgment complained of, and not embraced in the original record, cannot be noticed. *Succession of Gourjon*, 422.

16. Where there is no statement of facts, assignment of error, or bill of exceptions, and the record shows that it does not contain all the evidence upon which the case was tried below, the appeal must be dismissed.
Dufour v. *Lombard*, 450.

VI. *Matters urged for the first time after Appeal.*

17. Where a creditor who has been placed on the schedule of an insolvent, and made a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court

to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal. *Jacobs* v. *Bogart*, 162.

VII. *Judgment on Appeal, and Costs.*

18. Where the appellants cannot be injured by the judgment of the lower court, it will be affirmed.
Langfitt v. *Clinton and Port Hudson Railroad Company*, 41.

19. The decision of a court of the first instance refusing a new trial, will not be reversed unless clearly erroneous. *Davis* v. *Singleton*, 56.

20. An appellant will not be allowed, by delaying to complain, till after appeal, of a trivial error in the judgment, which would have been corrected below had it been asked for, to mulct the other party with the costs of the appeal.
Union Bank v. *Lea*, 75.

21. A prayer for the removal of an administratrix, presented for the first time on an application for a new trial, after judgment overruling an opposition to an account filed by her, is too late. To notice such a prayer on appeal, no issue thereon having been made or tried below, would be to assume original jurisdiction. *Succession of Kendrick*, 138.

See ROADS.

VIII. *Surety on Appeal Bond.*

22. The widow and heirs of a surety on an appeal bond cannot be proceeded against in the same manner as the surety himself may be, under the 20th sect. of the act of 20 March, 1839, amending art. 596 of the Code of Practice. In authorizing the summary remedy provided by that act, the legislature contemplated no other proceedings than those against the surety himself. *Saulet* v. *Trepagnier*, 227.

23. Where a judgment rendered below is affirmed on appeal, but the case remanded for the purpose of ascertaining the amount of expenses and damages due to the plaintiff for the reimbursement of jail fees, and other charges incurred in taking care of the property in dispute pending the suit, the amount of which had not been liquidated, though the right of the plaintiff to recover them had been recognized in the judgment of the lower court, the surety on the appeal bond will not be discharged. There is no change in the judgment appealed from. C. P. 579. *Hivert* v. *Lacaze*, 470.

24. An error as to the date of the judgment appealed from, committed in filling up a blank in an appeal bond signed by a party as the agent of the appellants and in his own name as surety, will not discharge the surety, where the judgment is otherwise sufficiently described. *Per Curiam:* The object of all written contracts is to express the intention of the parties, and where that clearly appears from the whole tenor of the instrument and the manner in which it was used, it will not be avoided for a clerical error, as to the surety, any more than as to the principal obligor. C. C. 1951. The rule *falsa demonstratio non nocet* properly applies to such a case. So

much of the description as is false must be rejected, and the instrument have its effect if a sufficient description remain.

Blanchard v. *Gloyd*, 542.

ASSIGNMENT.

See TRUST, DEED OF, 1, 6.

ATTACHMENT.

The garnishees having bonded certain property attached by plaintiff, a third person subsequently intervened claiming the property and praying for a dissolution of the attachment. On an exception by plaintiff on the ground that the property had been released on the execution of the bond, the intervention was dismissed. *Per Curiam:* Property attached is represented by the bond given for its release only as to the attaching creditor, and for the sole purpose of satisfying any judgment he may obtain. Third persons, claiming it as owners after it has been bonded, must look to the property itself, which is no longer under the control of the court. *Beal* v. *Alexander*, 349.

ATTORNEY AT LAW.

1. Defendant, an attorney at law, having recovered a judgment for the plaintiff, subsequently purchased certain slaves from the debtor, and in part payment, assumed the debt due by the latter to his client. In an action by the client to enforce payment of the debt assumed, and defence that plaintiff had never notified defendant of his acceptance of the assumption: *Held*, that the attorney was bound to hold on to any advantage he had acquired for his client, and to notify him thereof immediately; and that the relation existing between the parties bound the attorney to comply with his assumption, without waiting for the acceptance of his client, and notice thereof.

McMichael v. *Davidson*, 53.

2. An attorney at law is responsible for any injury resulting from his neglect of business intrusted to him. Thus where an attorney employed by the administrator to prepare and file a *tableau* of distribution of the effects of a succession, neglects to avail himself of the means of obtaining correct information, but prepares, and without submitting it to the administrator, files a *tableau* by which the balance in the hands of the latter is represented as much larger than it really is, and, after the errors are pointed out to him by the administrator, neglects to have it corrected, and the *tableau* is finally homologated, he will be responsible for the injury which the administrator may sustain in consequence of such neglect. Nor will it be any defence to an action against him to allege, that if the administrator were charged with interest on the sums which had remained in his hands, the balance represented by the *tableaux* would not exceed the amount really due to the succession, he having no right to benefit by a debt, which, if it exist, is owing to the creditors or heirs of the estate. *Thompson* v. *Lobdell*, 369.

3. Where, through the negligence of an attorney in preparing a *tableau* of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator. *Ibid.*

ATTORNEY IN FACT.

See AGENT.

BANK.

I. *Banks generally.*
II. *Citizens Bank of Louisiana.*
III. *Commercial Bank of New Orleans.*

I. *Banks generally.*

1. By sect. 13 of the act of 14 March, 1842, for the liquidation of banks, it is provided, that it shall be the duty of the notary employed to make an inventory of the property and effects of the bank, and at the time of making such inventory, to destroy, under the inspection of the commissioners and of the board of currency, all the notes of the bank which may be on hand at the time, including such as may not be completed, in the presence of two witnesses and of the officers of the bank, if any be present, of all which mention shall be made in the inventory. *Held:* that the services required of the notary by this provision, are a part of the labor of making the inventory, and that he is entitled to no additional compensation therefor.

State v. *Atchafalaya Railroad and Banking Company*, 198.

2. The delays granted to the debtors of the banks in the city of New Orleans by the third section of the act of 5 February, 1842, reviving the charters of these banks, apply only to the debts due to the banks at the time of the passage of the act. That act contemplated that any debtor desiring to obtain the extension of time for which it provides, should make a direct application to the board of directors of the bank to which the debt was due, stating the security which he proposed to furnish, and that such security, whether real or personal, should be examined and found satisfactory by the board, before allowing the extension. *Planché* v. *Roy*, 453.

II. *Citizens Bank of Louisiana.*

3. Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent

to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizure and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter in order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Citizens Bank v. *Buisson*, 506.

III. *Commercial Bank of New Orleans.*

See CONTRACTS.

BANKRUPT.

The fact that one named as an executor has become a bankrupt since the death of the testator, and before his application to be recognized as such, does not disqualify him. *Per Curiam:* The law (C. C. art. 1150) contemplates a change in the condition of the executor, after he shall have entered on the discharge of his duties, by becoming a bankrupt, as good ground for removal; but it does not follow that he becomes legally disqualified for a future appointment, by such a change. *Succession of Gourjon*, 422.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Presentment for Payment, Protest and Notice.*
II. *Promise to Pay, and Payment after Discharge.*
III. *Evidence in Actions on Bills and Notes.*
IV. *Defence to Actions on Bills and Notes.*

I. *Presentment for Payment, Protest and Notice.*

1. Proof of notice of protest directed to the legal representative of an endorser who had died before the maturity of the note, is insufficient to entitle the holder to recover in an action against the heir of the latter.

Christmas v. *Fluker*, 13.

2. Where a notary certifies in his protest that he demanded payment of a note at the place at which it was payable, though he does not state that he took the note with him or presented it for payment, it is sufficient. *Per Curiam:* The person making a presentment or demand must have with him the bill or note he is charged to collect; but the presumption is that the notary did his duty, until the contrary be shown. *Harbour* v. *Taylor*, 32.

3. Notice of the protest of a draft, instead of being directed to the endorser at the post office at which he was in the habit of receiving his letters, was directed to that office, under cover to the holder, who received the notice, and, on the next day, deposited it in the same office, directed to the endorser there: *Held*, that the notice was insufficient under the statute of 13 March, 1827; that it should have been directed to the endorser at his domi-

cil or usual place of residence, and not have been sent to a third person to be subsequently deposited in the same post office; and that where the mail is resorted to as the earliest ordinary conveyance, such conveyance must not be interrupted. *Carmena* v. *Doherty*, 57.

4. Notice of protest to an endorser, deposited in the post office of the place in which, or in the neighborhood of which, he resides, is insufficient under the general commercial law. *Ibid.*

5. Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank, at which it was payable, at the bank, "who answered that it could not be paid there being no funds in bank for that purpose," it is sufficient. On an objection that there was no evidence that the notary *presented* the note to the cashier: *Held*, that the latter having said there were no funds to pay the note, no presentation was necessary. *Union Bank* v. *Lea*, 75.

6. The holder of a promissory note on which there are several endorsers, is only bound to give notice of protest to the one whom he intends to hold liable. If the endorser so notified wishes to secure his recourse against the others, he must give notice himself, where it has not been done by the holder. *Ibid.* *Union Bank* v. *Hyde*, 418.

7. Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank at which it was payable, at the bank, it is sufficient. It was unnecessary to state that the note was presented when the demand was made.

Union Bank v. *Penn*, 79. *Peet* v. *Dougherty*, 85.

8. The naming of a city at large is not such an indication of a place of payment of a note, as will make it necessary to make a demand anywhere to entitle the holder to recover. *Per Curiam*: The words *place of payment* mean a house, bank, counting-room, store, or place of business, where the holder can present the note, and the maker provide or deposit funds to meet it, and where a legal offer to pay can be made. *Montross* v. *Doak*, 170.

9. The certificate of a notary by whom a bill or note has been protested should state the day on which notice was given to the endorser. It is not necessary to mention the date of the letter containing the notice.

Palmer v. *Lee*, 537.

10. Where, after due diligence, a notary is unable to ascertain the residence of an endorser, notice of protest must be put in the nearest post-office to the place at which such protest was made, addressed to him at the place at which the note or bill appears, from its face, to have been drawn. Notice in a letter addressed to the endorser, and left at the domicil of a subsequent endorser is insufficient. Act 13 March, 1827, § 3. *Ibid.*

II. *Promise to Pay, and Payment after Discharge.*

11. A promise to pay a bill, made by an endorser who has been discharged by the *laches* of the holder, to be binding, must have been made with full knowledge of such *laches*, and with the intention of waiving his legal rights. Di-

rect proof of such knowledge is not required; it may be inferred from circumstances attending the promise. *Heath* v. *Commercial Bank*, 334.

12. Money paid by the endorser of a bill who had been discharged by the *laches* of the holder, in ignorance of his discharge, may be recovered back. C. C. 2280. There is, on his part, no such natural obligation to pay, as can prevent his recovering the amount. C. C. 2281. *Per Curiam:* His undertaking was, to pay, provided the holder made due demand of the acceptor, and gave him due notice of non-acceptance or non-payment. His obligation was conditional; and when the condition failed, he was under no obligation, either natural or civil, to pay. *Ibid.*

13. Where in an action against the endorser of a note the holder relies on a promise to pay made after the endorser had been discharged by the *laches* of the holder, it is incumbent on him to show that the promise was made by the endorser with full knowledge that he had been so discharged. But an actual payment furnishes a presumption of indebtedness; and where an endorser seeks to recover back the amount of a note on the ground that it was paid by him in ignorance of the fact that he had been discharged, he must show that he was so discharged. *Union Bank* v. *Hyde*, 418.

III. *Evidence in Actions on Bills and Notes.*

14. The certificate of a notary, though without a date, is legal evidence to show the manner in which the notice of protest to the endorser of a note was served or forwarded. Its insufficiency, from the want of a date, to establish the diligence used in serving the notice, is no reason why it should not be received so far as it goes. Act 13 March, 1827, § 1. It is evidence of all the matters therein stated, and other evidence may be introduced to show a complete compliance with all the requisites of the law. The testimony of the notary may be used to establish the date of the certificate and notice: such evidence, not contradicting, but merely supplying an omission in the certificate. *Per Curiam:* It might, perhaps, be otherwise, if the evidence was intended to contradict the certificate.

Union Bank v. *Penn*, 79.

15. The statute of 13 March, 1827, which authorizes the certificate of the notary by whom a note or bill has been protested, to be used as evidence of the manner in which the demand was made, and notices of protest served, introduced a new mode of proof of the facts therein stated; but it does not preclude a party who may not choose to resort to it, from producing parol evidence of such facts. *Ibid.*

16. Where in an action against the maker and endorser of a note, the maker pleads that she was a married woman at the time of executing the note, which was signed by her as surety for her husband, and that she was in no way benefitted by the consideration received therefor, and the endorser answers separately but adopts the defence set up by his co-defendant, he cannot be examined as a witness for the latter to establish the facts alleged in her answer, being interested in destroying her obligation as maker.

Macarty v. *Roach*, 357.

17. The endorser of a note is a competent witness for the maker where the facts attempted to be proved by his testimony have no tendency to affect his responsibility, nor to change, as to him, the ultimate result of the suit.

Ibid.

18. The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, in any action by the holder against an endorser, was repealed by article 3521 of the Civil Code. *Ibid.*

19. Where on an appeal from a judgment confirming one taken by default against an absent defendant as endorser of a bill of exchange, the record shows that no evidence was introduced to establish the agency of the person on whom the citation was served, nor to prove the signature of the defendant or a demand and notice of protest, the judgment must be reversed.

Mechanics and Traders Bank v. *Walton*, 451.

20. The testimony of a witness that he gave defendant legal and timely notice of the protest of a bill, is insufficient to prove notice. *Per Curiam:* A notary, or other person called to prove a notice of protest, must state the time, manner, and circumstances under which the notice was given, that the court may judge of its sufficiency. He is not to take upon himself to decide upon its sufficiency. *Ibid.*

21. A promise by an endorser to pay the amount of a bill exceeding five hundred dollars, made after protest, is an agreement to pay money, which, under art. 2257 of the Civil Code, must be proved by one credible witness, and other corroborating circumstances appearing *aliunde*. *Ibid.*

IV. *Defence to Actions on Bills and Notes.*

22. The maker of a note secured by mortgage when sued by a party subrogated to the rights of the payee, cannot defend himself by alleging that the syndic of the creditors of the payee, by whom the subrogation was made, had no authority to make it. The creditors alone can complain if the syndic acted illegally. The defendant is not called upon to protect their rights.

Planché v. *Roy*, 453.

CARRIERS.

In an action against the owners of a steamer to recover the value of property shipped on their boat, and not delivered pursuant to the bill of lading, where the defence is that the property was lost in consequence of a collision with another boat, without defendants' fault, evidence is admissible to show that the property was lost in consequence of the collision, without any fault or negligence on the part of defendants or their agents, and that the accident was unavoidable. *Per Curiam:* If there was no fault or carelessness on the part of the defendants or their agents, and it was out of their power to prevent the collision, the accident must be considered unavoidable, and one of the dangers of the river within the meaning of the bill of lading, for which the carriers are not responsible. C. C. 2725. *Van Hern* v. *Taylor*, 201.

CITATION.

1. Citation in an action of nullity must be served on the defendant himself, or the suit will be dismissed. C. P. 610. Service on the attorney of the defendant in the action in which the judgment sought to be annulled was rendered, is insufficient. *Jacobs* v. *Ducros*, 115.

2. Sect. 14 of the act of 16 March, 1826, which provides that where the party to whom notice is to be given, either of a final judgment or other proceeding in the City Court of New Orleans, does not reside within the jurisdiction of the court and has no attorney in fact, or at law resident therein, execution may be issued, or other proceedings had without notice, does not apply to the citation to a defendant. *Ibid.*

3. One who intends to commence an action against the sheriff of a parish in which there is no coroner, must provoke the appointment of one, the coroner alone having authority to serve process on the sheriff. *Ibid.*

See APPEAL, IV.

CITIZENS BANK OF NEW ORLEANS.

See BANK, II.

CLINTON AND PORT HUDSON RAILROAD COMPANY.

The commissioners appointed under the second section of the act of 26 March, 1842, ch. 149, providing for the liquidation of the affairs of the Clinton and Port Hudson Railroad Company, are authorized to perform all conservatory acts necessary to protect the interests of the State. They are the agents of the State, and, in that capacity, may sue and be sued. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

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I. *Code of* 1808.

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2260. Competency of Witnesses. *Lynch* v. *Burr*, 96. *Macarty* v. *Roach*, 357.
2279. Quasi-Contracts. *Hills* v. *Kernion*, 522.
2280, 2281. Quasi-Contracts. *Heath* v. *Commercial Bank*, 334. *Hills* v. *Kernion*, 522.
2294. Offences and Quasi-Offences. *Walden* v. *Parrish*, 245. *Etting* v. *Commercial Bank*, 459.
2304. Offences and Quasi-Offences. *Villeré* v. *Grœter*, 203.
2353. Husband and Wife. *Fortier* v. *Slidell*, 398.
2374, 2375. Husband and Wife. *Succession of De Lizardi*, 167.
2402. Husband and Wife. *Fulton* v. *Her Husband*, 73.
2412. ——— *Macarty* v. *Roach*, 357.

2421. Sale. *Lallande* v. *Terrell*, 67.
2456. —— *Merritt* v. *Burgess*, 434.
2531. —— *Erwin* v. *Greene*, 175.
2535. —— *Ibid.* *Williams* v. *Bank of Louisiana*, 316.
2537. —— *Erwin* v. *Greene*, 175.
2604 to 2611. Compulsory Transfer of Property. *Police Jury of Jefferson* v. *D'Hemecourt*, 509.
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2949, 2950. Judicial Sequestration. *Parkison* v. *Boyle*, 82.
2996. Mandate. *Succession of Gourjon*, 422.
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3508. Prescription. *Succession of Tilghman*, 387.
3521. Repealing laws on subjects specially provided for in the Code. *Dupeux* v. *His Creditors*, 242.

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18. Action to recover amount paid through error. *Hills* v. *Kernion*, 522.
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401, 402, 403. Opposition of third persons. *Fulton* v. *Her Husband*, 73. *Willis* v. *Her Husband*, 87.
419. Amendment of petition. *Succession of Rouzan*, 436.
536. Judgment of nonsuit. *Mills* v. *Webber*, 108.
546, 547, 548. Judgment. *Mechanics and Traders Bank* v. *Walton*, 451.
558, 561. New Trial. *Ibid.*
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579. Appeal. *Hivert* v. *Lacaze*, 470.
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601. Reduction of testimony to writing. *Landry* v. *Jefferson College*, 179.
602, 603. Appeal. *Ibid.*
610. Action to annul judgments. *Jacobs* v. *Ducros*, 115.
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679, 683. —— *Fortier* v. *Slidell*, 398.

684, 689. Execution of judgments. *Hills* v. *Jacobs*, 406.
693, 707 to 710. ——————— *Fortier* v. *Slidell*, 398.
848. Prohibition. *Berthaud* v. *Police Jury of Jefferson*, 550.
924. Courts of Probate. *Le Page* v. *Gas Light and Banking Company*, 183.
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925. ——————— *Le Page* v. *Gas Light and Banking Company*, 183.
974 to 996. Successions. *Self* v. *Morris*, 24.
998. Tutors and curators. *Aubic* v. *Gil*, 50.
1000 to 1003. Successions. *Le Page* v. *Gas Light and Banking Company*, 183.
1053 to 1055. ——————— *Succession of Williams*, 46.

COMMERCIAL BANK OF NEW ORLEANS.

See CONTRACTS.

COMPENSATION.

1. Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt due by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception. *Dick* v. *Byrne*, 465.
2. In an action against a partnership for a debt, defendants may compensate by way of exception, a debt due by plaintiff to a member of the partnership individually. *Ibid.*

CONFLICT OF LAWS.

1. The validity and effect of a will made and carried into execution in another State, and the kind of estate which it confers upon the legatees especially as to personal effects situated in that State, must be tested by the law of the domicil of the testator and not of the legatees. *Penny* v. *Christmas*, 481.
2. Where property acquired under a will executed in another State is brought by the legatee into this State, where he dies, it must descend according to the laws of this State. The right of inheriting property situated here cannot be governed by the laws of another State, though originally acquired and brought from that State. *Ibid.*

CONFUSION.

Where a debtor of a succession becomes entitled to the succession by inheritance from the heir, his debt will be extinguished by confusion only to the amount remaining after the payment of all the debts of the estate. C. C. 2214. If the debts are unpaid, the executor may recover from the debtor the amount necessary to pay them; or if they have been discharged by advances made by the executor, he may recover from the debtor the amount

of such advances, the debt of the latter being extinguished only to the amount coming to him from the succession after the payment of all its debts.

Brunetti v. *Barnabé*, 117.

CONSTITUTION OF LOUISIANA.

Art. 4, § 2. Jurisdiction of Supreme Court. *State* v. *Williams*, 252.

CONSTITUTION OF THE UNITED STATES.

Art. 1, § 8. Power of Congress to lay taxes, imposts, duties, &c. *State* v. *Fullerton*, 210.

4, § 1. Public Acts, Records and Judicial Proceedings of other States. *Tait* v. *Lewis*, 206. *Succession of Tilghman*, 387.

On a question as to the constitutional authority of Congress, and the consequent restriction upon the power of State Legislatures, a decision of the Supreme Court of the United States must be regarded as settling the law.

State v. *Fullerton—Re-hearing*, 219.

CONTINUANCE.

1. An affidavit for a continuance on the ground of the absence of a witness, which does not show the materiality of his testimony, nor due diligence to procure his attendance, is insufficient. *Daniels* v. *Andrews*, 160.

2. Plaintiffs offered in evidence a paper proved by a witness to be a copy made by him at the request of one of the defendants from the original handed to him by the latter for that purpose, and which, with the original, had been returned to the defendant. Plaintiffs, having made oath that they had seen the original in possession of one of the defendants, notified the latter to produce the original. Two of the defendants answered that they had no such paper in their possession, nor had ever seen it, and that their co-defendant was absent, and moved for a continuance on the ground of surprise. *Held*, that the absence of the defendant to whom the original had been delivered was no ground for a continuance, and that the absence of the original was sufficiently accounted for to authorize the admission of the copy.

Hills v. *Jacobs*, 406.

CONTRACTS.

1. Plaintiff having recovered judgment against defendant, who was in community with his wife, caused a *fi. fa.* to be levied on certain lots of ground, which were purchased by A. at twelve months credit, who gave his bond for the price. Defendant subsequently made a surrender to his creditors; and plaintiff afterwards proceeded against the purchaser, under the 13th section of the act of 20 March, 1839, propounding interrogatories to him to ascertain whether he had property in his possession or under his control belonging to defendant, in which proceedings the syndic of defendant's credi-

tors intervened, claiming the property as belonging to the insolvent's estate. The purchaser answered, that he was requested by defendant's wife to purchase the property for her; and that he purchased the property, taking the title in his own name, but considered himself bound to make her a title therefor, provided the price be paid to him when the bond matures, and not otherwise. The court, before which the proceedings under the act of 1839 were instituted, considered the purchase to have been made for the benefit of the community, and decreed the property to belong to the syndic, by whom it was sold, and purchased by plaintiff. Before the bond matured, defendant's wife obtained a judgment of separation of property, and, on the day of its maturity, tendered the price to A., demanding a conveyance of the lots. In an action by plaintiff to recover the property: *Held*, that the wife, not being a party to the proceedings under the act of 1839, the judgment in favor of the syndic does not conclude her; that though the community existed at the time of the purchase by A., yet that, at the maturity of the bond when the conveyance was to be made to the wife on her paying the price, she was separated in property, and capable of acquiring property for herself, independently of her husband; that the title was suspended, remaining in A., liable to be divested, on the performance of the condition, at the maturity of the bond; and that the fact that the wife was capable of acquiring at the expiration of the time limited, sufficed to make the contract valid, and to give her a good title to the property, independently of her husband, on her compliance with the conditions of the agreement. *Lallande* v. *Terrell*, 67.

2. Where by a written agreement entered into at the time of dissolving a partnership, one of the partners who purchased the common stock bound himself to pay all the partnership debts, parol evidence will be inadmissible to prove a guaranty by the other partner, that the debts did not exceed a certain amount. C. C. 2256. *Lynch* v. *Burr*, 96.

3. All contracts, not in writing, for the payment of any amount exceeding five hundred dollars, must be proved at least by one credible witness, and corroborating circumstances. C. C. 2257. *Succession of Segond*, 111.

4. Action for damages against defendant for falsely representing to plaintiff, that he had concluded a contract for him for the delivery of a quantity of shells, at a certain price per barrel. It was proved that no such contract had been made; but defendant answered that he was willing to receive the shells at the price mentioned, and to pay the costs. *Per Curiam:* The court cannot compel a party to accept a new contract in lieu of one already violated, with a new party and under different circumstances, nor to waive his right to recover damages. *Daniels* v. *Andrews*, 160.

5. In every action on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080. *Bird* v. *Doiron*, 181.

6. By sect. 33 of the act of 1 April, 1833, incorporating the Commercial Bank of New Orleans, that institution is authorized to lay pipes in the streets of New Orleans for the purpose of supplying water for the use of the

inhabitants, on the condition of restoring the streets, in as short a time as possible, to the condition they were previously in. Defendants having neglected to replace the pavements in certain streets in which they had laid pipes, the city authorities, through certain persons subrogated to their rights against the Bank, caused the pavements to be replaced. In an action by the latter against the Bank for the cost of the repairs: *Held*, that a notice to defendants that the pavements had not been properly replaced, and a demand of them to comply with the requisitions of the charter by repairing the streets, was indispensable to a recovery.

Gerl v. *Commercial Bank*, 188.

7. Where one who has undertaken to erect buildings for a certain price, and to have them completed by a particular period, fails by his fault, to comply with his contract, in consequence of which the other party, under a clause in the contract, annuls the contract and recovers possession of the unfinished buildings, he cannot recover the value of materials, such as door and window frames and other joiner's work, not in the buildings, and which were never tendered to the owner of the buildings, nor in any way used by him. *Parker* v. *M'Gilway*, 192.

8. To render valid the ratification of an obligation against which an action of nullity or rescission would lie, the act of ratification must etate the substance of the obligation, the motive of the action of nullity or rescission, and the intention to supply the defect on which such action would be founded. C. C. 2252. *Wilcox* v. *Henderson*, 338.

9. A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2412): and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act.

Macarty v. *Roach*, 357.

10. Where it is proved that plaintiffs were induced, through the misrepresentations of defendant, or his agents, to consent to accept in satisfaction of certain mortgage notes held by them an amount much below their real value, the agreement will be rescinded on the ground of error.

Hills v. *Jacobs*, 406.

11. Where plaintiff sues before maturity, on a written promise of defendant to pay him a certain amount at a future period, and introduces no proof that the amount was payable, as alleged by him, at an earlier period, he must be nonsuited. *Carter* v. *Hodge*, 433.

See APPEAL, 24.

CORONER.

See SHERIFF, 1.

CORPORATION.

Corporators may maintain an action against each other relative to the affairs of the corporation, during its existence. *Percy* v. *White*, 513.

COSTS.

1. An appellant will not be allowed, by delaying to complain, till after appeal, of a trivial error in the judgment, which would have been corrected below had it been asked for, to mulct the other party with costs of the appeal. *Union Bank* v. *Lea*, 75.

2. A judgment of nonsuit can, in no case, support the plea of *res judicata*. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a *fi. fa.* against a third person, opposes the sale, and the judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the opponent, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536. *Mills* v. *Webber*, 108.

3. Where an action for the rescission of a lease, in which defendant claims damages in reconvention, is tried after the lease has expired, though there can be no judgment of rescission, yet if defendant's demand in reconvention be overruled, and the evidence shows that plaintiff would have been entitled to a judgment of rescission had the trial taken place sooner, there must be judgment in his favor for the costs. *Caffin* v. *Scott*, 205.

COURTS.

1. When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996. *Self* v. *Morris*, 24.

2. Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it. *Ibid.*

3. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. *Per Curiam:* The action should have been before the Probate Court. *Rhodes* v. *Union Bank*, 63.

4. Sect. 14 of the act of 16 March, 1826, which provides that where the party

to whom notice is to be given, either of a final judgment or other proceeding in the City Court of New Orleans, does not reside within the jurisdiction of the court, and has no attorney in fact, or at law resident therein, execution may be issued, or other proceedings had without notice, does not apply to the citation to a defendant. *Jacobs* v. *Ducros*, 115.

5. Lands belonging to a succession, though situated in another parish, may be sold by the probate judge of the parish in which the succession is opened. *Chaney* v. *Gray*, 144.

6. District Courts have jurisdiction of an action by heirs to compel the transfer to them of stock owned by the deceased where there are no debts due by the succession. *Per Curiam:* Such a case is not one of those enumerated in arts. 924, 925 of the Code of Practice as coming exclusively under the power and jurisdiction of Courts of Probate, which being of limited and special jurisdiction cannot take cognizance of matters which, though relating to a succession, are not placed by law under their immediate control and jurisdiction. *Le Page* v. *Gas Light and Banking Company*, 183.

7. Where the judge of an inferior court refuses obedience to an order of the Supreme Court directing him to allow an appeal, he may be committed to prison until he complies with such order. *State* v. *Williams*, 252.

8. The Legislature having made no provision for the exercise of criminal jurisdiction by the Supreme Court, and the court having repeatedly declined to assume it, the question can no longer be considered as an open one. *Ibid.*

9. A Court of Probates has jurisdiction of an action against minors represented by their tutor, for property in the possession of the latter, where both parties claim under a bequest made by a common ancestor and plaintiff sues for a partition. *Penny* v. *Christmas*, 481.

DEFAULT.

See CONTRACTS, 6, 7.

DEPOSITARY.

Where a depositary of money to be drawn upon checks or orders pays a forged check, he will be liable for the amount with legal interest from judicial demand. *Etting* v. *Commercial Bank*, 459.

DISCONTINUANCE.

1. Where an intervening party prays for a dissolution of an injunction obtained by plaintiff, and for interest and damages, the plaintiff cannot, by dismissing his suit, deprive the former of his right to a judgment. *Whittemore* v. *Watts*, 10.

2. Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter

contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter. *Succession of Gourjon*, 422.

DOMICIL.

See POLICE JURY, 2.

DONATIONS MORTIS CAUSA.

1. Where one to whom property is bequeathed in case of her surviving a certain person, dies before the latter, the legacy will be without effect. C. C. 1691. *Mishon* v. *Bein*, 146.

2. To ascertain the intention of the testator the different clauses of a will must be construed with reference to each other. C. C. 1705, 1706. *Ibid.*

3. To ascertain the intention of a testator every part of his will must be considered. The amount of his estate, the number of persons whom nature has placed so near to him as to make it his duty to attend to their wants, the situation of those who claim to be the object of his bounty, their relationship to him, and their comparative wealth or need must also be considered, where the language of the testator is uncertain. *Oxley* v. *Clay*, 425.

4. The validity and effect of a will made and carried into execution in another State, and the kind of estate which it confers upon the legatees especially as to personal effects situated in that State, must be tested by the law of the domicil of the testator and not of the legatees. *Penny* v. *Christmas*, 481.

5. In the construction of wills money ordered to be invested in any species of property for the purposes of a bequest, is always regarded as such property. Money to be employed in the purchase of land is treated as land. *Ibid.*

6. In the construction of wills the intention of the testator is the object to be ascertained, and the language used by him must be understood according to its ordinary, popular signification. *Ibid.*

7. A testator by a will executed in the State of South Carolina, where he resided, directed a certain sum "to be invested in the purchase of slaves, for the use of S. during her life, and, after her death, said slaves to return and vest forever in her sons M. and R., and the heirs of their bodies." M. and R. were in existence at the time of the devise: *Held*, that the object of the testator was to give a life estate to S., and, after her death, the full property to M. and R.; that such a disposition is valid by the laws of South Carolina, where the common law, modified by statutes, prevails; that by the laws of that State slaves are considered personal property; that M. and R. had an estate in remainder, to be enjoyed after the life estate of S. had terminated, but which vested in them at the creation of the particular estate; and that, on the death of S. and the termination of her estate, M. and R., or

their heirs, became entitled to the possession and enjoyment of the property as tenants in common. *Ibid.*

ERROR.

1. Plaintiffs enjoined an order of seizure and sale taken out by a creditor by judicial mortgage against a lot of ground belonging to their debtor, and on which they claimed to have an anterior special mortgage. The lot mortgaged to plaintiffs was erroneously described as being lot 2 in square No. 9, instead of lot 2 in square No. 5; but it was proved that there was no square No. 9, and the description was, in other respects, sufficient to identify the lot; *Held*, that the error cannot affect plaintiffs' mortgage, it not having misled the defendant, whose right resulted from the recording of a judgment operating on all the property of the debtor.

City Bank v. *Denham*, 39.

2. Where it is proved that plaintiffs were induced, through the misrepresentations of defendant, or his agents, to consent to accept in satisfaction of certain mortgage notes held by them an amount much below their real value, the agreement will be rescinded on the ground of error.

Hills v. *Jacobs*, 406.

3. One who alleges error as the basis of his action must show it, or show, at least, that the evidence of it is exclusively in the power of his adversary.

Union Bank v. *Hyde*, 418.

EVIDENCE.

I. *Onus Probandi.*

II. *Presumption.*

III. *Competency of Witness.*

IV. *Examination of Witness.*

V. *Admissibility of Evidence.*

VI. *Judicial Records and Proceedings.*

VII. *Non-judicial Records.*

VIII. *Private Writings.*

IX. *Proof of Contracts not in Writing, over Five Hundred Dollars in Value.*

X. *Parol Evidence to Explain, Alter or Destroy Written Instruments.*

XI. *Secondary Evidence.*

XII. *Evidence of Parties.*

XIII. *Evidence in Particular Actions.*

1. *In Actions on Bills of Exchange and Promissory Notes.*

2. *On Appeals from decisions of Jury of Freeholders establishing a Road.*

I. *Onus Probandi.*

1. An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. *Wheat* v. *Union Bank*, 94.
2. Where in an action for damages for the loss of a slave drowned while engaged in an illegal traffic with defendants, no evidence is introduced to show the value of the slave, no judgment can be rendered in favor of plaintiff. *Villeré* v. *Græter*, 203.
3. One who alleges error as the basis of his action must show it, or show, at least, that the evidence of it is exclusively in the power of his adversary. *Union Bank* v. *Hyde*, 418.
4. As a general rule, he who affirms must prove; but as there are many negative propositions which it would be impossible to prove directly, the burden of proof, in such cases, is thrown on the opposite party. *Ibid.*
5. Where plaintiff sues before maturity, on a written promise of defendant to pay him a certain amount at a future period, and introduces no proof that the amount was payable, as alleged by him, at an earlier period, he must be nonsuited. *Carter* v. *Hodge*, 433.
6. The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendee the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the usufruct, or retains the possession by a precarious title. C. C. 2456. *Merritt* v. *Burgess*, 434.

See 8, 9, 11, *infra*.

II. *Presumption.*

7. Satisfaction of a judgment may be proved by presumptions, as well as by positive evidence. The sufficiency of the proof must depend on the circumstances of each case. *Bethany* v. *His Creditors*, 61.
8. Where in an action to recover certain slaves it is proved that defendant got possession of them illegally and fraudulently, and was the last person seen in possession of them, they will be presumed to be still in his possession. The burden of proving that he has parted with the possession is on him. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.
9. The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a

day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied. *Succession of Tilghman*, 387.

10. The effect of a legal presumption is, to relieve the party in whose favor it exists from the necessity of making any proof; but this presumption may be destroyed by proof that the fact is otherwise than the law presumes. *Aliter*, as to presumptions *juris et de jure*, against which no proof can be admitted. *Ibid.*

11. Where in an action against the endorser of a note the holder relies on a promise to pay made after the endorser had been discharged by the *laches* of the holder, it is incumbent on him to show that the promise was made by the endorser with full knowledge that he had been so discharged. But an actual payment furnishes a presumption of indebtedness; and where an endorser seeks to recover back the amount of a note on the ground that it was paid by him in ignorance of the fact that he had been discharged, he must show that he was so discharged. *Union Bank* v. *Hyde*, 418.

See 37, *infra*. FRAUD, 1, 2.

III. *Competency of Witness.*

12. The second section of the act of 27 March, 1823, which declares "that no person who has made a surrender of his property for the use of his creditors, shall be admitted as a witness, except in cases of usury and unlawful contracts, in any civil suit brought either by the mass of his creditors against any of his creditors or debtors, or by any of the said debtors or creditors against the mass of the creditors of said person, on any contract, note or obligation entered into, drawn or executed, or subscribed by the said person previous to his having made a surrender of his property," is repealed by art. 3521 of the Civil Code. Art. 2169 of the Civil Code has no reference to that act. *Dupeux* v. *His Creditors*, 243.

13. The master and others employed in the navigation of a vessel, though servants of the owners in different grades of authority, are competent witnesses for their employers. A witness is not incompetent because he is, or has been in the employment of the party who calls him. *Randall* v. *Laguerenne*, 327.

14. Where in an action against the maker and endorser of a note, the maker pleads that she was a married woman at the time of executing the note, which was signed by her as surety for her husband, and that she was in no way benefitted by the consideration received therefor, and the endorser answers separately but adopts the defence set up by his co-defendant, he cannot be examined as a witness for the latter to establish the facts alleged in her answer, being interested in destroying her obligation as maker. *Macarty* v. *Roach*, 357.

15. The endorser of a note is a competent witness for the maker where the

facts attempted to be proved by his testimony have no tendency to affect his responsibility, nor to change, as to him, the ultimate result of the suit. *Ibid.*

16. The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, in any action by the holder against an endorser, was repealed by article 3521 of the Civil Code. *Ibid.*

17. A father is incompetent as a witness for his illegitimate child. C. C. 2260. *Per Curiam:* The mere fact of a witness being the ascendant of the party for or against whom he is called, is sufficient to render him incompetent. The law makes no distinction as to fathers by legal marriage or otherwise. *Ibid.*

IV. *Examination of Witness.*

18. A witness, under cross-examination, may state matters which, though not directly called for by the question propounded to him, might be brought out by a direct question from the other side.

Cross v. *Police Jury of Lafourche Interior*, 121.

V. *Admissibility of Evidence.*

19. Defendant sued on a note which she alleged to be counterfeited, objected to its being produced in evidence by plaintiff, without his being first required to account for erasures and other defects apparent on its face. The court being unable to say whether there were such erasures and blemishes as should authorize the exclusion of the note till explained or accounted for, permitted the note to go to the jury; *Held*, that the matter in controversy being specially within the province of the jury, the note was, under the circumstances, properly submitted to their consideration.

Dawson v. *Dawson*, 36.

20. In an action against the curator to recover an amount due by the deceased, plaintiff alleged that the latter had been very careful in keeping his accounts, and that evidence of her demand would be found on his books, or among his papers: *Held*, that this allegation does not show that the demand was founded on a written contract, nor compel the petitioner to admit the books and papers of the deceased in evidence. *Succession of Segond*, 111.

21. In an action against the owners of a steamer to recover the value of property shipped on their boat, and not delivered pursuant to the bill of lading, where the defence is that the property was lost in consequence of a collision with another boat, without defendants' fault, evidence is admissible to show that the property was lost in consequence of the collision, without any fault or negligence on the part of defendants or their agents, and that the accident was unavoidable. *Per Curiam:* If there was no fault or carelessness on the part of the defendants or their agents, and it was out of their power to prevent the collision, the accident must be considered unavoidable

and one of the dangers of the river within the meaning of the bill of lading, for which the carriers are not responsible. C. C. 2725.

Van Hern v. *Taylor*, 201.

22. In an action for a balance due for labor and materials, an account proved to have been furnished by plaintiff to defendant, may be offered in evidence by the latter, though not in the hand-writing of plaintiff; but the plaintiff may introduce evidence to destroy its effect. *Donaldson* v. *Walker*, 329.

See 41, 45, 46, *infra*. ROADS, 2.

VI. *Judicial Records and Proceedings.*

23. A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died *pendente lite*, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is *prima facie* evidence against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, s. 1. C. P. 122. *Per Curiam:* We are not prepared to say, that it is conclusive against the heirs or executor here.

Tait v. *Lewis*, 206.

24. A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State. *Succession of Tilghman*, 387.

25. Complete mutuality or identity of all the parties is not necessary in order to admit depositions of an absent witness taken in a former suit. It is generally sufficient if the matters at issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness. *Clossman* v. *Barbancey*, 438.

See 35, 36, *infra*.

VII. *Non-Judicial Records.*

26. The certificate of a Recorder of Mortgages that no mortgage existed on a lot of ground offered for sale by a Sheriff, is entitled to no weight, in opposition to authentic evidence showing that a mortgage really existed on the property. *City Bank* v. *Denham*, 39.

27. Where an authentic act of sale contains an absolute assumption by the purchaser of a debt due by the vendor to a third person, a paper signed by the vendor, declaring that the assumption was not an absolute one, will be inadmissible against such third person to disprove the absolute character of the assumption, unless the fact be sworn to. *McMichael* v. *Davidson*, 53.

VIII. *Private Writings.*

28. Where the real date of an act *sous seing privé* is not proved *aliunde*, it will date as to third persons, only from the day of its production in court.
McMichael v. *Davidson*, 53.

IX. *Proof of Contracts not in Writing over Five Hundred Dollars in Value.*

29. All contracts, not in writing, for the payment of any amount exceeding five hundred dollars, must be proved at least by one credible witness, and corroborating circumstances. C. C. 2257. *Succession of Segond*, 111.

30. A promise by an endorser to pay the amount of a bill exceeding five hundred dollars, made after protest, is an agreement to pay money, which, under art. 2257 of the Civil Code, must be proved by one credible witness, and other corroborating circumstances appearing *aliunde*.
Mechanics and Traders Bank v. *Walton*, 451.

X. *Parol Evidence to Explain, Alter or Destroy Written Instruments.*

31. Where, by a written agreement entered into at the time of dissolving a partnership, one of the partners who purchased the common stock bound himself to pay all the partnership debts, parol evidence will be inadmissible to prove a guaranty by the other partner, that the debts did not exceed a certain amount. C. C. 2256. *Lynch* v. *Burr*, 96.

32. A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2412); and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act.
Macarty v. *Roach*, 357.

33. In an action on a written lease defendant may introduce parol evidence to show that plaintiff had consented, prior to the expiration of the lease, that a third person should occupy the premises as his tenant. *Per Curiam:* The testimony does not contradict the written lease, but only shows a subsequent agreement in relation to it. *Cunningham* v. *Caldwell*, 520.

XI. *Secondary Evidence.*

34. Plaintiffs offered in evidence a paper proved by a witness to be a copy made by him at the request of one of the defendants from the original handed to him by the latter for that purpose, and which, with the original, had been returned to the defendant. Plaintiffs, having made oath that they had seen the original in possession of one of the defendants, notified the latter to produce the original. Two of the defendants answered that they had no such paper in their possession, nor had ever seen it, and that their co-defendant was absent, and moved for a continuance on the ground of surprise. *Held*, that the absence of the defendant to whom the original had been delivered

was no ground for a continuance, and that the absence of the original was sufficiently accounted for to authorize the admission of the copy.

Hills v. *Jacobs*, 406.

35. Proceedings under a rule, not connected with the suit, taken by plaintiff against defendant and yet under advisement, are inadmissible in evidence, where it is not shown that the witnesses examined on the rule are absent, or that their attendance cannot be procured.

Clossman v. *Barbancey*, 438.

XII. *Evidence of Parties.*

36. A deposition made by a party in an action which he had brought as a syndic, is admissible in evidence in an action in which he is sued both individually and as syndic. *Per Curiam:* Extra-judicial statements made by the defendant would be good evidence in support of a personal demand against him; *a fortiori*, his testimony taken in open court should be received. How far such testimony is to affect those whom he represents as syndic is a question which goes more to the effect, than to the admissibility of the evidence. *Clossman* v. *Barbancey*, 438.

XIII. *Evidence in Particular Actions.*

1. *In Actions on Bills of Exchange and Promissory Notes.*

37. Where a notary certifies in his protest that he demanded payment of a note at the place at which it was payable, though he does not state that he took the note with him or presented it for payment, it is sufficient. *Per Curiam:* The person making a presentment or demand must have with him the bill or note he is charged to collect; but the presumption is that the notary did his duty, until the contrary be shown. *Harbour* v. *Taylor*, 32.

38. Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank, at which it was payable, at the bank, "who answered that it could not be paid, there being no funds in bank for that purpose," it is sufficient. On an objection that there was no evidence that the notary *presented* the note to the cashier: *Held*, that the latter having said there were no funds to pay the note, no presentation was necessary. *Union Bank* v. *Lea*, 75.

39. The certificate of a notary, though without a date, is legal evidence to show the manner in which the notice of protest to the endorser of a note was served or forwarded. Its insufficiency, from the want of a date, to establish the diligence used in serving the notice, is no reason why it should not be received so far as it goes. Act 13 March, 1827, § 1. It is evidence of all the matters therein stated, and other evidence may be introduced to show a complete compliance with all the requisites of the law. The testimony of the notary may be used to establish the date of the certificate and notice: such evidence, not contradicting, but merely supplying an omission in the certificate. *Per Curiam:* It might, perhaps, be otherwise, if the evidence was intended to contradict the certificate.

Union Bank v. *Penn*, 79.

40. The statute of 13 March, 1897, which authorizes the certificate of the notary by whom a note or bill has been protested, to be used as evidence of the manner in which the demand was made, and notices of protest served, introduced a new mode of proof of the facts therein stated; but it does not preclude a party who may not choose to resort to it, from producing parol evidence of such facts. *Ibid.*

41. A notary cannot be examined as a witness to contradict a statement made by him in a protest. *Per Curiam:* A public officer, who has given a certificate in his official character, cannot be listened to as a witness to prove it false. *Peet* v. *Dougherty*, 85.

42. A promise to pay a bill, made by an endorser who has been discharged by the *laches* of the holder, to be binding, must have been made with full knowledge of such *laches*, and with the intention of waiving his legal rights. Direct proof of such knowledge is not required; it may be inferred from circumstances attending the promise. *Heath* v. *Commercial Bank*, 334.

43. Where on an appeal from a judgment confirming one taken by default against an absent defendant as endorser of a bill of exchange, the record shows that no evidence was introduced to establish the agency of the person on whom the citation was served, nor to prove the signature of the defendant or a demand and notice of protest, the judgment must be reversed.

Mechanics and Traders Bank v. *Walton*, 451.

44. The testimony of a witness that he gave defendant legal and timely notice of the protest of a bill, is insufficient to prove notice. *Per Curiam:* A notary, or other person called to prove a notice of protest, must state the time, manner, and circumstances under which the notice was given, that the court may judge of its sufficiency. He is not to take upon himself to decide upon its sufficiency. *Ibid.*

See 14, 15, 16, 19, 30, *supra.*

2. *On Appeals from decisions of Jury of Freeholders establishing a Road.*

45. On an appeal from the decision of a jury of freeholders establishing a road through the lands of the appellant, defendants offered in evidence a petition addressed to them by the former, at a previous period, with parol evidence to show the action on it, and the selection by the appellant, of the route to which defendants consented in their answer: *Held*, that the evidence was admissible; and that if there had been any change in the property, or in circumstances, calculated to alter his opinion, it was competent for him to show it, and thereby destroy the effect of the evidence.

Cross v. *Police Jury of Lafourche Interior*, 121.

46. On an appeal from the decision of a jury of freeholders establishing a road, under the act of 12 March, 1818, the appellant may introduce evidence to prove that a convenient and good road may be laid out through his lands, less injurious than the one proposed by the jury, though such route was not specially indicated in his opposition. So, evidence will be admissible on his part to show, that the construction of the road along another route

would cost less than the one designated by the defendants, the law giving to the court and jury to whom the appeal is submitted, a power of revision over the damages as well as the course of the road. *Ibid.*

EXCEPTION.

See PLEADING, 19, 20, 21.

EXECUTION OF JUDGMENT.

I. *Seizure under a Fi. Fa.*
II. *Effect of Seizure and Privilege on Things Seized.*
III. *Sale of Things Seized.*
IV. *Interrogatories to Third Persons under a Fi. Fa.*

I. *Seizure under a Fi. Fa.*

1. A seizure under a *fi. fa.* of property of a debtor made after a petition has been presented for a forced surrender under the act of 1808, is illegal. Act of 25 March, 1808, s. 20. *Jacobs* v. *Bogart*, 162.
2. A judgment creditor cannot treat a conveyance made by his debtor as null and seize the property so conveyed, in the possession of a third person. If the conveyance be illegal or void, he must sue such third person to annul it. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.
3. Where the return made by an officer on a *fi. fa.* recites that his predecessor had seized in the hands of A. in his capacity of sheriff, certain notes or bonds, but they were not actually seized and taken into possession by the officer, but were kept by A. and subsequently handed over to his successor in office, there is no legal seizure. *Per Curiam:* The officer should have taken the notes or bonds into his possession, or at least, have called upon A. for their delivery, when, in case of his refusal, the plaintiff, so long as a *fi. fa.* remained in the hands of the officer, would have been entitled to his remedy under sect. 13 of the statute of 20th March, 1839.
Simpson v. *Allain*, 500.
4. To make a legal and valid seizure of tangible property, in the hands of a debtor or of a third person, by which the seizing creditor may acquire a privilege on the thing seized, the sheriff must take the object into his posession. The 10th sect. of the statute of 10th February, 1841, provides for the only exception to this rule where the property is in the possession of one of the sheriffs created by it under a previous seizure. *Ibid.*

II. *Effect of Seizure and Privilege on Things Seized.*

5. All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as

in case of a *concurso*. C. P. 301, 401, 402. 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a *fi. fa.* by a third person, the latter can acquire no greater right than if he had seized the property itself.

Fulton v. *Her Husband*, 73.

6. A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a *fi. fa.* at the suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403. *Willis* v. *Her Husband*, 67.

7. So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403. *Ibid.*

8. No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a *fi. fa.*, issued after the commencement of the insolvent proceedings. *Per Curiam:* The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the *tableau* of distribution. Its only effect is to place the property in the hands of the syndic to be administered. *Jacobs* v. *Bogart*, 162.

III. *Sale of Things Seized.*

9. A purchaser at a judicial sale of property on which there exists a general mortgage, judicial or legal, against whom an action has been commenced, or who has good reason to fear that an action will be commenced against him by the mortgagee, may withhold the price until relieved from such apprehension, or until proper security be given against the danger of eviction. C. P. 710. *Fortier* v. *Slidell*, 398.

10. The statement by a sheriff in an act of sale, that the property is sold subject to a general mortgage made in compliance with the provision of the Code of Practice, art. 693, § 6, can impose no obligation on the purchaser to which he is not subjected by law. *Per Curiam:* A sheriff has no authority of his own to impose any burden on a purchaser beyond the provisions of the law. Purchasers at sales under execution, are not personally bound for anterior general mortgages existing on the property purchased by them. They are only liable to an hypothecary action. C. P. 679, 683, 693, 710. *Ibid.*

11. Where a purchaser at a judicial sale refuses to pay the amount of a special mortgage, which formed a part of the price and had been left in his hands at the time of the sale, on the ground of the danger of eviction, and the property is resold at the suit of the special mortgagee, the first sale becomes null and void. *Ibid.*

12. The Code of Practice does not provide for the erasure of mortgages subsequent or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgagees to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue. *Ibid.*

13. No adjudication can be made of property subject to special mortgages of an older date than that of the mortgagee at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684. *Hills* v. *Jacobs*, 406.

14. Where a bidder for property offered for sale at the suit of a mortgagee refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid. *Ibid.*

IV. *Interrogatories to Third Persons under a Fi. Fa.*

15. The remedy given by sect. 13 of the act of 20th March, 1839, is applicable only where the plaintiff has applied for a writ of *fi. fa.*

Simpson v. *Allain*, 500.

See EVIDENCE, 9.

EXECUTOR

See SUCCESSIONS, II.

EXECUTORY PROCESS.

1. Plaintiff having obtained an order directing defendants to sell for cash certain property mortgaged to him, subsequently took a rule on the latter to show cause why they should not be punished as for a contempt for disobeying the order of sale. There was no opposition to the order of sale, nor was any appeal taken from it. Defendants in answer to the rule, having alleged their willingness to comply with the order, but suggesting that the sale ought not to be made for cash, the court directed it to be made on the

terms suggested by the defendants: *Held*, that the court had no authority to set aside its first judgment but on a regular opposition.

State v. *Atchafalaya Railroad and Banking Company*, 447.

2. Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizure and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter in order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Citizens Bank v. *Buisson*, 506.

FAMILY MEETING.

See MINOR, 7.

FATHER AND CHILD.

A father is incompetent as a witness for his illegitimate child. C. C. 2260. *Per Curiam:* The mere fact of a witness being the ascendant of the party for or against whom he is called, is sufficient to render him incompetent. The law makes no distinction as to fathers by legal marriage or otherwise.

Macarty v. *Roach*, 357.

FRAUD.

1. In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud. *Layson* v. *Rowan*, 1.
2. The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent. *Ibid.*
3. Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: *Held*, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.

Farrar v. *Peyroux*, 92.

4. An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the de-

fendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. *Wheat* v. *Union Bank*, 94.

5. The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendee the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the usufruct, or retains the possession by a precarious title. C. C. 2456.

Merritt v. *Burgess*, 434.

FREEDOM, SUIT FOR.

See SLAVE.

HUSBAND AND WIFE.

1. Plaintiff having recovered judgment against defendant, who was in community with his wife, caused a *fi. fa.* to be levied on certain lots of ground, which were purchased by A. at twelve months credit, who gave his bond for the price. Defendant subsequently made a surrender to his creditors; and plaintiff afterwards proceeded against the purchaser, under the 13th section of the act of 20 March, 1839, propounding interrogatories to him to ascertain whether he had property in his possession or under his control belonging to defendant, in which proceedings the syndic of defendant's creditors intervened, claiming the property as belonging to the insolvent's estate. The purchaser answered, that he was requested by defendant's wife to purchase the property for her; and that he purchased the property, taking the title in his own name, but considered himself bound to make her a title therefor, provided the price be paid to him when the bond matures, and not otherwise. The court, before which the proceedings under the act of 1839 were instituted, considered the purchase to have been made for the benefit of the community, and decreed the property to belong to the syndic, by whom it was sold, and purchased by plaintiff. Before the bond matured, defendant's wife obtained a judgment of separation of property, and, on the day of its maturity, tendered the price to A., demanding a conveyance of the lots. In an action by plaintiff to recover the property: *Held*, that the wife, not being a party to the proceedings under the act of 1839, the judgment in favor of the syndic does not conclude her; that though the community existed at the time of the purchase by A., yet that, at the maturity of the bond when the conveyance was to be made to the wife on her paying the price, she was separated in property, and capable of acquiring property for herself, independently of her husband; that the title was suspended, remaining in A., liable to be divested, on the performance of the condition, at the maturity of the bond; and that the fact that the wife was capable of acquiring at the expiration of the time limited, sufficed to make the contract valid, and to give her a good title to the property, independently of her husband, on her compliance with the conditions of the agreement. *Lallande* v. *Terrell*, 67.

2. No period is fixed by the Civil Code, within which a wife, who has obtained a judgment of separation of property, must commence proceedings under

her judgment. It requires only that there shall be a *bona fide* non-interrupted proceeding to obtain payment. Where a judgment of separation was obtained on the 3d of July, and duly advertised, but no execution was issued till the 28th of October following, the delay is not such as to deprive the wife of the right of enforcing her claim against her husband, and to render her judgment null, especially where no right has been acquired in the mean time, by any third person. C. C. 2402. *Fulton* v. *Her Husband*, 73.

3. Plaintiff having sold a tract of land before her marriage, received certain notes for the price. The notes matured after her marriage, when, the purchaser being unable to pay, agreed to rescind the sale, and on receiving his notes, reconveyed the property to the plaintiff. She subsequently resold the property to a third person, her husband assisting in the sale, and receiving the price. *Held*, that the re-transfer made to the plaintiff by the first purchaser, cannot be viewed as a purchase made during the marriage; that the land became the property of the petitioner, in the same manner as if the first sale had been judicially rescinded; that she held it by the title she had before her marriage, as though no sale had been made; and that, consequently, it never belonged to the community. *Ibid.*

4. A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a *fi. fa.* at the suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403. *Willis* v. *Her Husband*, 87.

5. Though a minor who has been emancipated by marriage become a widow before the age of twenty-one, she will not return to the state of pupilage. *Wilcox* v. *Henderson*, 328.

6. A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2412): and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act. *Macarty* v. *Roach*, 357.

7. The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community. *Fortier* v. *Slidell*, 398.

8. Although the distinct interest of the wife, or of her representatives, attaches at the time of the dissolution of the marriage, subject to the right to renounce and be exonerated from the payment of the community debts, they can claim nothing from the community until such debts are paid. No action can be maintained by them for the half of the price of any specific property acquired during the marriage, where it is not shown, by a liquidation of the community, that there are any gains to be divided. *Ibid.*

HYPOTHECARY ACTION.

See EXECUTORY PROCESS.

ILLEGITIMATE CHILD.

See FATHER AND CHILD.

INDICTMENT.

1. The first section of the statute of 29 January, 1817, forbidding the introduction into this State of slaves convicted of certain crimes, and denouncing a fine of five hundred dollars for every slave brought into the State in violation of its provisions and the forfeiture of the slave, one-half for the use of the State and the other half for the use of the informer, creates an indictable offence; and where the proceedings against one charged with a violation of the statute were by indictment, no appeal will lie from a sentence pronounced on the verdict of a jury, declaring the slaves so imported to be forfeited, and condemning the offender to pay the fine imposed by the statute and the costs, and to stand committed until they are paid. *State* v. *Williams*, 252.
2. By the common law every act *contra bonos mores*, is an indictable offence; but no such mass of undefined offences exists in this State. Nothing is punishable here which is not made an offence and the punishment denounced by legislative authority; but whatever constitutes an offence against the public by act of the Legislature may be prosecuted by indictment, unless a different mode of proceeding be expressly provided for. *Ibid.*

INJUNCTION.

1. After a motion to dissolve an injunction, plaintiff cannot, by filing an amended petition containing new allegations, cure a radical defect in his original proceedings, and thereby give effect to an injunction originally illegal.
Rhodes v. *Union Bank*, 63.
2. A sheriff who pays over money in violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.
Randall v. *Parkison*, 134.
3. Where an injunction has been obtained to prevent defendant from obstructing the petitioner in the free use of a common passage way, on proof that the obstruction which existed at the time the injunction was sued out has not been removed, the court may order it to be removed at once by the Sheriff, without waiting for a trial on the merits.
McDonogh v. *Calloway*, 442.
4. An injunction may be directed to parties or to public officers to compel them to do certain acts, as well as to restrain them from acting. It is as effective to enforce a right as to prevent a wrong. Thus an injunction may issue to compel the removal of an obstruction in a common way. C. P. 298. *Ibid.*

INSOLVENCY.

1. In the State of Mississippi, in which the common law prevails, a debtor, though insolvent, may, by a deed of trust, grant a preference to a part of his creditors; and, having a right to determine which of them shall be paid, he may dictate the terms of payment. *Layson* v. *Rowan*, 1.

2. The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent. *Ibid.*

3. No re-inscription of a mortgage is necessary, where the mortgagor has made a surrender of his property and obtained a stay of proceedings. C. C. 3326. *Per Curiam:* The rights of the creditors of an insolvent must be acted on with reference to their situation when his *bilan* was filed, and all proceedings against him stayed. *Bethany* v. *His Creditors*, 61.

4. All actions pending, and all claims against one who has made a forced surrender under the statute of 25 March, 1808, for the relief of insolvent debtors in actual custody, must be removed to, and cumulated in the tribunal before which the insolvent proceedings are pending.
Jacobs v. *Bogart*, 162.

5. No security is required by the statute of 25 March, 1808, relative to insolvent debtors, from syndics appointed under the provisions of that act. The first section of the act of 13 March, 1837, is the only law requiring syndics to give security, and it relates exclusively to insolvent proceedings in cases of the voluntary surrender of property under the statute of 20 February, 1817. The statute of 1817 does not apply to forced surrenders. The two modes of surrender are distinct, and governed by different laws. *Ibid.*

6. Where a creditor who has been placed on the schedule of an insolvent, and made a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal. *Ibid.*

7. A seizure under a *fi. fa.* of property of a debtor made after a petition has been presented for a forced surrender under the act of 1808, is illegal. Act of 25 March, 1808, s. 20. *Ibid.*

8. No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a *fi. fa.*, issued after the commencement of the insolvent proceedings. *Per Curiam:* The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the *tableau* of distribution. Its only effect is to place the property in the hands of the syndic to be administered. *Ibid.*

9. A debtor committed to prison, under the provision of the sixth section of the act of 28 March, 1840, for refusing to comply with a judgment ordering him to file a schedule or statement of his affairs as required by the fifth section of that act, cannot be discharged from imprisonment on the ground, that the amount required by the act of 17 March, 1820, to be paid weekly to the

keeper of the jail, for the use of a debtor confined on *mesne* process, or under execution, has not been advanced for his use. *Ex parte Powell*, 240.

10. The second section of the act of 27 March, 1823, which declares "that no person who has made a surrender of his property for the use of his creditors, shall be admitted as a witness, except in cases of usury and unlawful contracts, in any civil suit brought either by the mass of his creditors against any of his creditors or debtors, or by any of the said debtors or creditors against the mass of the creditors of said person, on any contract, note or obligation entered into, drawn or executed, or subscribed by the said person previous to his having made a surrender of his property," is repealed by art. 3521 of the Civil Code. Art. 2169 of the Civil Code has no reference to that act. *Dupeux* v. *His Creditors*, 243.

11. Where a father, who while solvent, had made advances to some of his children upon their hereditary shares in his succession but not as extra portions, dies insolvent, his estate, so far as his forced heirs are concerned, must be considered as consisting only of the advances so made, and the disposable portion must be calculated on their amount. But the creditors of the deceased have no right to look to such advances for the payment of their claims as the amounts so advanced did not belong to their debtor at the time of his death. *Grandchamps* v. *Delpeuch*, 429.

INSURANCE.

1. Policies of insurance against fire are personal contracts with the assured, and do not pass to an assignee or purchaser without the consent of the insurers. The transfer of the policy is equivalent to a new contract of insurance with the transferree.

Leavitt v. *Western Marine and Fire Insurance Company*, 351.

2. Where a policy of insurance provides that, "in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in, or endorsed on this instrument, or otherwise acknowledged by them in writing, this insurance shall be void;" and a third person, to whom the property insured had been assigned and to whom the policy was transferred with the assent of the insurers, fails to notify the latter at the time of the transfer of another policy previously taken out by him on the same property, the insurers will be discharged. A declaration of the first insurance made after the loss, in compliance with a condition of the policy requiring all persons insured sustaining any loss, to declare on oath whether any and what other insurance has been made on the same property, will be too late. *Ibid.*

INTEREST.

1. A minor is entitled to legal interest on the amount ascertained to be due to her by her tutor, from the date of the judgment ascertaining the amount so due. C. C. 353. *Aubic* v. *Gil*, 50.

2. Plaintiff sold defendants a tract of land, for the price of which notes were

taken bearing interest, at a certain rate, from date until paid. The land was subject to a mortgage in favor of a third person, and it was stipulated in the act of sale, that the notes should remain with a depositary until the vendor should cause the mortgage to be released, and that the notes should not be payable until such release. It was admitted that the land was capable of producing revenue by being rented. There was no attempt by the purchasers to relieve themselves from interest by depositing the price. *Held*, that the purchasers knowing that the notes were not to be paid until the release of the mortgage, and having consented that interest should run from the date of the contract until payment, the interest must be paid as part of the consideration of the sale. *Erwin* v. *Greene*, 175.

3. Where real estate, capable of producing revenue, is sold for a price payable at a fixed period, and the note of the purchaser is taken for the price, without any stipulation as to interest, but subject to the condition that the note shall remain on deposit, and the payment not be demandable until the vendor shall release a mortgage existing on the property, and the purchaser has possession and enjoyment of the thing sold, legal interest will be due on the price of the property from the time when the principal was payable. C. C. 1933, 2531. Though entitled to suspend the payment of the price until the mortgage be released, the purchaser could only avoid the payment of interest by depositing the price. C. C. 2537. *Ibid.*

4. Action against defendants, who had guarantied plaintiffs against any loss they might sustain as sureties on bonds for the payment of duties, to recover the amount of certain bonds which they had been compelled to pay, with interest. *Held*, that plaintiffs were entitled to recover the amount of the bonds paid by them, with interest thereon at six per cent from the time of such payment. Act of Congress of 2 March, 1799, § 65.

Toole v. *Durand*, 363.

5. A stipulation in an act of sale that the purchaser may postpone the payment of the principal for a certain time, on paying interest at six per cent annually in advance, is not usurious or illegal. *Bacchus* v. *Moreau*, 539.

INTERPRETATION.

To ascertain the intention of the testator the different clauses of a will must be construed with reference to each other. C. C. 1705, 1706.

Mishon v. *Bein*, 146.

See CONSTITUTION OF THE UNITED STATES. SUCCESSIONS, 15.

INTERVENTION.

See PLEADING, VI.

JUDGMENT.

1. A judgment of nonsuit, or one rendered in a case in which the parties are not the same, cannot support the plea of *res judicata*. *Gilbert* v. *Burg*, 15.

2. To support the plea of *res judicata* the cause of action must be the same in the two suits. *Noble* v. *Cooper*, 44.

3. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. *Per Curiam:* The action should have been before the Probate Court.
Rhodes v. *Union Bank*, 63.

4. Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: *Held*, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.
Farrar v. *Peyroux*, 92.

5. An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. *Wheat* v. *Union Bank*, 94.

6. A judgment of nonsuit can, in no case, support the plea of *res judicata*. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a *fi. fa.* against a third person, opposes the sale, and the judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the opponent, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536. *Mills* v. *Webber*, 108.

7. Citation in an action of nullity must be served on the defendant himself, or the suit will be dismissed. C. P. 610. Service on the attorney of the defendant in the action in which the judgment sought to be annulled was rendered, is insufficient. *Jacobs* v. *Ducros*, 115.

8. A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died *pendente lite*, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is *prima facie* evidence against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, § 1. C. P. 122. *Per Curiam:* We are not prepared to say, that it is conclusive against the heirs or executor here.
Tait v. *Lewis*, 206.

9. Mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which has never been annulled, or-

dering the erasure of a previous mortgage, must be respected. Third persons are not bound to look beyond such a decree.

Guesnon v. *His Creditors*, 382 *Dumas* v. *Guesnon*, 518.

10 An action on a judgment obtained in another State is prescribed only by the lapse of twenty years, where the judgment creditor resides out of this State. C. C. 3508. *Succession of Tilghman*, 387.

11. The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied. *Ibid.*

12. A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State. *Ibid.*

13. Where a statute declares that a judgment shall be presumed to have been paid, in case no execution be sued out within a certain period after it was rendered, the period must be calculated from the date of the judgment, though anterior to the passage of the act, and though sufficient time have not elapsed since its enactment to establish the presumption if calculated from that time. *Ibid.*

14. A judgment is inchoate only, and no appeal lies from it, until signed by the judge. *Mechanics and Traders Bank* v. *Walton*, 451.

15. To support the plea of *res judicata*, the parties to the two suits and the question presented must be the same.

State v. *Atchafalaya Railroad and Banking Company*, 447.

16. Plaintiff having obtained an order directing defendants to sell for cash certain property mortgaged to him, subsequently took a rule on the latter to show cause why they should not be punished as for a contempt for disobeying the order of sale. There was no opposition to the order of sale, nor was any appeal taken from it. Defendants in answer to the rule, having alleged their willingness to comply with the order, but suggesting that the sale ought not to be made for cash, the court directed it to be made on the terms

suggested by the defendants: *Held*, that the court had no authority to set aside its first judgment but on a regular opposition. *Ibid.*

See HUSBAND AND WIFE, 1. MINOR, 9.

JURY.

Where a case in which the defendant prayed for a trial by jury, has been transferred to the docket of cases to be tried by the court, in consequence of the defendant's failure to advance the compensation allowed to the jurors, as required by the statute of 10 February, 1841, s. 17, and has been taken up as a court case, it will be too late, at the moment of trial, to tender the compensation, and to move for a re-transfer of the case to the jury docket.

Daniels v. *Andrews*, 160.

JURY OF FREEHOLDERS.

See ROADS.

LETTING AND HIRING.

1. A lessor may rescind a lease where the building is used for a purpose not contemplated at the time of the contract, and such use is injurious to him.

Caffin v. *Scott*, 295.

2. Where an action for the rescission of a lease, in which defendant claims damages in reconvention, is tried after the lease has expired, though there can be no judgment of rescission, yet if defendant's demand in reconvention be overruled, and the evidence shows that plaintiff would have been entitled to a judgment of rescission had the trial taken place sooner, there must be judgment in his favor for the costs. *Ibid.*

3. Defendants sold to a third person, who occupied a building leased from plaintiff, certain boxes of merchandize, for the price of which the purchaser gave his note payable thirty days after date. The merchandize was delivered to the purchaser, and placed in his shop in the building leased from plaintiff. Two or three days after the sale, the purchaser absconded; but, on the eve of his departure, wrote to a third person to deliver the merchandize to defendant, and to get back the note given for the price. Defendant took the merchandize from the store of the purchaser and gave up his note, and resold the merchandize. In an action by the landlord against defendant to recover the value of the merchandize thus removed from the premises: *Held*, that the parties were in a condition to rescind the previous sale, and that defendant was not liable to plaintiff for the value of the merchandize. *Walden* v. *Parrish*, 245.

4. In an action on a written lease defendant may introduce parol evidence to show that plaintiff had consented, prior to the expiration of the lease, that a third person should occupy the premises as his tenant. *Per Curiam:* The testimony does not contradict the written lease, but only shows a subsequent agreement in relation to it. *Cunningham* v. *Caldwell*, 520.

See CARRIERS.

MARSHAL OF THE CITY COURT OF LAFAYETTE.

No law creates any legal mortgage on the estate of a marshal of the City Court of Lafayette for the faithful discharge of the duties of his office, nor can any such mortgage be created by recording his official bond in the office of the Recorder of Mortgages. The tenth sect. of the act of 15 March, 1830, establishing a mortgage on the estates of sheriffs, does not apply to marshals. *Cain* v. *Bouligny*, 159.

MINOR.

1. The accounts of the tutor must be settled, before any order can be obtained for the seizure and sale of property in the possession of a third person, subject to the general mortgage in favor of the minor; but a judgment in favor of the latter, rendered on an opposition made by him to a *tableau*, of distribution presented by the curatrix of the deceased tutor, ordering the minor to be placed thereon as a creditor of the deceased for the amount claimed, and recognizing his mortgage, is a sufficient settlement.

Gilbert v. *Burg*, 15.

2. A natural tutor is entitled to administer the property of his children without giving security, (C. C. 327, 330); but he cannot administer upon a succession opened in their favor, without having been appointed administrator, and giving security as any other individual. C. C. 1037. It is only after such an appointment that he can be considered as the representative of the succession, and be sued as such in the Court of Probates for the debts due by the estate. *Self* v. *Morris*, 24.

3. As a succession opened in favor of minors can be accepted for them only with benefit of inventory, it cannot be said to be their property, and does not legally come into their possession, until it has been duly administered, when, whatever may remain after the payment of debts, will fall under the administration of their tutor. C. C. 1051. Arts. 327 and 330 of the Civil Code provide only for the administration of the separate and exclusive property of minors, in which no other person is interested. *Ibid.*

4. Where, in an action by a minor against her tutor, plaintiff prays that the latter may be ordered to render an account, and to pay her a certain sum, or whatever amount may be found due by him, and defendant renders no account, the plaintiff may prove any sum received by him. C. P. 998. *Per Curiam:* The rule that a general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner in which the sum accrued, is too vague to authorize the admission of proof, the object of which is to prevent the defendant from being taken by surprise, is inapplicable to the case of a tutor called upon to account, who knows what is asked of him; his ward is under no obligation to state the time, place and manner of receiving the sums for which he is accountable.

Aubie v. *Gil*, 50.

5. In rendering judgment in an action by a minor against her tutor for a set

tlement of the tutorship, the commissions of the latter should be allowed though not expressly claimed *Ibid.*

6. A minor is entitled to legal interest on the amount ascertained to be due to her by her tutor, from the date of the judgment ascertaining the amount so due. C. C. 353. *Ibid.*

7. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. *Per Curiam:* The action should have been before the Probate Court.

Rhodes v. *Union Bank*, 63.

8. An attorney in fact appointed by the natural tutrix of minor heirs residing abroad, cannot represent the heirs in the settlement of the succession of their father, opened in this State, where the property left by the deceased was held in community, and the natural tutrix as surviving spouse, has rights which must be exercised contradictorily with the minor heirs. In such a case, an attorney must be appointed to represent the absent heirs, C. C. 1654. *Per Curiam:* If the natural tutrix were present, having rights to exercise contradictorily with the minor heirs she could not represent them; an under-tutor alone could act for them. C. C. 301.

Succession of De Lizardi, 167.

9. A tutor cannot, by proceedings had contradictorily with the under-tutor during the minority of his pupil, make any settlement of his accounts, which will be conclusive upon the latter on attaining the age of majority. Nor does art. 301 of the Civil Code, which makes it the duty of the under-tutor to act for the minor whenever the interest of the latter is opposed to that of the tutor, give the under-tutor any authority to require the tutor to render his accounts. *McGehee* v. *Dupuy*, 229.

10. Though a minor who has been emancipated by marriage become a widow before the age of twenty-one, she will not return to the state of pupilage.

Wilcox v. *Henderson*. 338.

11. A tutor, not shown to have received any property belonging to his ward, has no account to render. *Ibid.*

12. A Court of Probates has jurisdiction of an action against minors represented by their tutor, for property in the possession of the latter, where both parties claim under a bequest made by a common ancestor and plaintiff sues for a partition. *Penny* v. *Christmas*, 481.

See SUCCESSIONS, 1, 2, 19.

MORTGAGE.

I. *Execution and Proof of Mortgages.*
II. *Legal Mortgages.*
III. *Registry of Mortgages.*
IV. *Action to Foreclose Mortgage.*

V. *Sale of Mortgaged Property.*
VI. *Erasure of Mortgages.*

I. *Execution and Proof of Mortgages.*

1. In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud. *Layson* v. *Rowan*, 1.
2. Plaintiffs enjoined an order of seizure and sale taken out by a creditor by judicial mortgage against a lot of ground belonging to their debtor, and on which they claimed to have an anterior special mortgage. The lot mortgaged to plaintiffs was erroneously described as being lot 2 in square No. 9, instead of lot 2 in square No. 5; but it was proved that there was no square No. 9, and the description was, in other respects, sufficient to identify the lot; *Held*, that the error cannot affect plaintiffs' mortgage, it not having misled the defendant, whose right resulted from the recording of a judgment operating on all the property of the debtor.

City Bank v. *Denham*, 39.

3. The certificate of a Recorder of Mortgages that no mortgage existed on a lot of ground offered for sale by a sheriff, is entitled to no weight, in opposition to authentic evidence showing that a mortgage really existed on the property. *Ibid.*

II. *Legal Mortgages.*

4. A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a *fi fa.* at the suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403. *Willis* v. *Her Husband*, 57.
5. No law creates any legal mortgage on the estate of a marshal of the City Court of Lafayette for the faithful discharge of the duties of his office, nor can any such mortgage be created by recording his official bond in the office of the Recorder of Mortgages. The tenth sect. of the act of 15 March, 1830, establishing a mortgage on the estates of sheriffs, does not apply to marshals. *Cain* v. *Bouligny*, 159.
6. No legal mortgage exists but in the cases provided for by the Civil Code, or by subsequent statutes. C. C. 3280. *Ibid.*

See 9, 10, *infra.*

III. *Registry of Mortgages.*

7. The omission to register a mortgage, cannot be taken advantage of by a purchaser of the mortgaged property, who assumed the payment of the debt secured by mortgage as part of the price. *Noble* v. *Cooper*, 44.
8. No re-inscription of a mortgage is necessary, where the mortgagor has

made a surrender of his property and obtained a stay of proceedings. C. C. 3326. *Per Curiam:* The rights of the creditors of an insolvent must be acted on with reference to their situation when his *bilan* was filed, and all proceedings against him stayed. *Bethany* v. *His Creditors*, 61.

9. The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community. *Fortier* v. *Slidell*, 398.

See 5, *supra.*

IV. *Action to Foreclose Mortgage.*

10. The accounts of the tutor must be settled, before any order can be obtained for the seizure and sale of property in the possession of a third person, subject to the general mortgage in favor of the minor; but a judgment in favor of the latter, rendered on an opposition made by him to a *tableau* of distribution presented by the curatrix of the deceased tutor, ordering the minor to be placed thereon as a creditor of the deceased for the amount claimed, and recognizing his mortgage, is a sufficient settlement.

Gilbert v. *Burg*, 15.

11. The maker of a note secured by mortgage when sued by a party subrogated to the rights of the payee, cannot defend himself by alleging that the syndic of the creditors of the payee, by whom the subrogation was made, had no authority to make it. The creditors alone can complain if the syndic acted illegally. The defendant is not called upon to protect their rights.

Planché v. *Roy*, 453.

12. Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizure and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter in order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Citizens Bank v. *Buisson*, 506.

13. Where plaintiff, having prayed for an order of seizure and sale against certain property and notified defendant as executor of the mortgagor, subsequently changes the proceedings to those *via ordinaria*, and, representing that defendant is in possession of the mortgaged property, prays that he may be cited and for a judgment against him for the amount of the debt, and in case of his failure to pay, ordering the property to be sold, the judgment should direct the mortgaged property to be sold, unless the defendant pay the mortgage debt. The defendant being cited in the proceedings *via or-*

dinaria, merely as the actual possessor of the mortgaged premises, no judgment can be rendered against him as executor. *Ibid.*

V. *Sale of Mortgoged Property.*

14. All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as in case of a *concurso*. C. P. 301, 401, 402, 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a *fi. fa.* by a third person, the latter can acquire no greater right than if he had seized the property itself.

Fulton v. *Her Husband*, 73.

15. So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403. *Willis* v. *Her Husband*, 87.

16. No adjudication can be made of property subject to special mortgages of an older date than that of the mortgagee at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684. *Hills* v. *Jacobs*, 406.

17. Where a bidder for property offered for sale at the suit of a mortgagee refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid. *Ibid.*

VI. *Erasure of Mortgages.*

18. The refusal of a mortgagee to consent to the erasure of a mortgage will not subject him to the payment of damages, though the mortgage had ceased to exist, where there is no proof of any actual injury, nor of any fraud or bad motive on the part of the mortgagee, who merely asserted a legal right which he believed to exist. *Williams* v. *Bank of Louisiana*, 316.

19. Mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which has never been annulled, ordering the erasure of a previous mortgage, must be respected. Third persons are not bound to look beyond such a decree.

Guesnon v. *His Creditors*, 382. *Dumas* v. *Guesnon*, 518.

20. The Code of Practice does not provide for the erasure of mortgages subsequent or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that

price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgagees to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue. *Fortier* v. *Slidell*, 398.

NEW TRIAL.

The decision of a court of the first instance refusing a new trial, will not be reversed unless clearly erroneous. *Davis* v. *Singleton*, 56.

NONSUIT.

1. A judgment of nonsuit can, in no case, support the plea of *res judicata*. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a *fi. fa.* against a third person opposes the sale, and the Judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the opponent, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536. *Mills* v. *Webber*, 180.
2. A plaintiff, who instead of submitting his case to the jury on the evidence received, moves for a nonsuit with leave to set it aside, may appeal from a decision of the court refusing to set aside the nonsuit and grant a new trial. *Per Curiam:* Such a mode of proceeding is a convenient way of bringing up for the decision of the Supreme Court incidental questions, without going into a trial on the merits of the case.

Clossman v. *Barbancey*, 438.

NOTARY.

1. A notary cannot be examined as a witness to contradict a statement made by him in a protest. *Per Curiam:* A public officer, who has given a certificate in his official character, cannot be listened to as a witness to prove it false. *Peet* v. *Dougherty*, 85.
2. A notary is entitled to charge for an inventory executed out of his office, fifty cents for every hundred words; but he is not entitled to any allowance for memoranda made and attested by him for the purpose of preparing the inventory in proper form. For an attested copy of any act, not proved to

have been made out of his office, he can charge but twelve and a half cents for every hundred words. Act of 28 March, 1813, s. 8.

State v. *Atchafalaya Railroad and Banking Company*, 198.

3. By sect. 13 of the act of 14 March, 1842, for the liquidation of banks, it is provided, that it shall be the duty of the notary employed to make an inventory of the property and effects of the bank, and at the time of making such inventory, to destroy, under the inspection of the commissioners and of the board of currency, all the notes of the bank which may be on hand at the time, including such as may not be completed, in the presence of two witnesses and of the officers of the bank, if any be present, of all which mention shall be made in the inventory. *Held:* that the services required of the notary by this provision, are a part of the labor of making the inventory, and that he is entitled to no additional compensation therefor. *Ibid.*

4. Where notes given for the price of a tract of land are left in deposit with the notary by whom the act of sale was drawn up, the notes or their proceeds to be delivered to the vendor when the property sold shall be released from certain incumbrances, and the notary places them in a bank for collection, and suffers them to remain there after the bank had suspended specie payments until the makers paid them in the depreciated notes of the bank, he will be responsible to the vendor for the full amount of the notes.

Dupeux v. *His Creditors*, 243.

OFFENCES AND QUASI-OFFENCES.

1. Plaintiff purchased from the heirs of an actual settler, a claim to a tract of land which had been recommended by the Register and Receiver for confirmation, and which was subsequently confirmed. In an action against the defendants, who set up no title, for a trespass committed before the title was confirmed: *Held*, that plaintiff's title was sufficient to maintain an action against a mere trespasser. *Watterston* v. *Jetche*, 20.

2. Where one, through ignorance, commits a trespass on another's land, by cutting and removing timber, he will be responsible only for the actual value of the timber used or destroyed. *Per Curiam:* The case is different, where one wilfully and knowingly commits a trespass on private property. *Ibid.*

3. A sheriff who pays over money in violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.

Randall v. *Parkison*, 134.

4. Action for damages for a trespass committed by defendants on lands possessed by plaintiffs as owners, and defence that the lands belong to the United States, and that defendants entered thereon for the purpose of acquiring a pre-emption right thereto: *Held*, that the title of one possessing as owner cannot be subjected to investigation at the instance of a mere trespasser; and that a party cannot be permitted, under pretext of an intention to purchase from the United States, to assume that land, in the possession of another, is public, and liable to be entered on at pleasure.

Bonis v. *James*, 149.

5. Where in an action for damages against the owners of a steamer for injury resulting from a collision between the steamer and plaintiffs' vessel, the evidence leaves it doubtful whether any fault was attributable to the officers of the steamer, plaintiffs cannot recover.

Western Marine and Fire Insurance Company v. *Casselly*, 154.

6. Action for damages against defendant for falsely representing to plaintiff, that he had concluded a contract for him for the delivery of a quantity of shells, at a certain price per barrel. It was proved that no such contract had been made; but defendant answered that he was willing to receive the shells at the price mentioned, and to pay the costs. *Per Curiam:* The court cannot compel a party to accept a new contract in lieu of one already violated, with a new party and under different circumstances, nor to waive his right to recover damages. *Daniels* v. *Andrews*, 160.

7. Where in an action for damages for the loss of a slave drowned while engaged in an illegal traffic with defendants, no evidence is introduced to show the value of the slave, no judgment can be rendered in favor of plaintiff.

Villeré v. *Græter*, 203.

8. Before the act of 19th February, 1844, amending art. 2304 of the Civil Code, co-trespassers were liable jointly only, and not *in solido*. *Ibid.*

9. The refusal of a mortgagee to consent to the erasure of a mortgage will not subject him to the payment of damages, though the mortgage had ceased to exist, where there is no proof of any actual injury, nor of any fraud or bad motive on the part of the mortgagee, who merely asserted a legal right which he believed to exist. *Williams* v. *Bank of Louisiana*, 316.

10. In an action to recover from defendants damages for their failure to deliver to plaintiff certain notes, which they had improperly delivered to a third person, the value of the notes at the time they should have been delivered to plaintiff is the measure of the damages to which he is entitled, no fraud being alleged or proved; without prejudice, however, to his right of action against such third person for the delivery of the notes.

Gillett v. *Landis*, 332.

11. An attorney at law is responsible for any injury resulting from his neglect of business intrusted to him. Thus where an attorney employed by the administrator to prepare and file a *tableau* of distribution of the effects of a succession neglects to avail himself of the means of obtaining correct information, but prepares, and without submitting it to the administrator, files a *tableau* by which the balance in the hands of the latter is represented as much larger than it really is, and, after the errors are pointed out to him by the administrator, neglects to have it corrected, and the *tableau* is finally homogated, he will be responsible for the injury which the administrator may sustain in consequence of such neglect. Nor will it be any defence to an action against him to allege, that if the administrator were charged with interest on the sums which had remained in his hands, the balance represented by the *tableau* would not exceed the amount really due to the succession, he having no right to benefit by a debt, which, if it exist, is owing to the creditors or heirs of the estate. *Thompson* v. *Lobdell*, 369.

12. Where, through the negligence of an attorney in preparing a *tableau* of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator.

Ibid.

13. Where an injunction has been obtained to prevent defendant from obstructing the petitioner in the free use of a common passage way, on proof that the obstruction which existed at the time the injunction was sued out has not been removed, the court may order it to be removed at once by the Sheriff, without waiting for a trial on the merits.

McDonogh v. *Calloway*, 442.

14. As a general principle, corporations are responsible for the acts of their agents; but they are not liable for every act of the persons in their employment. Where an agent acting in the capacity bestowed on him by a corporation, under the directions of his employers, or in the discharge of some duty incidental to his situation, does any act which causes damage to another, the corporation will be responsible; *aliter*, where an act is done by him of his own free will, without reference to his functions as an agent. Thus a bank cannot be made liable in damages for an unauthorized declaration made by one of its officers, that plaintiff had frequently overdrawn his account. C. C. 430, 431, 433, 434. *Etting* v. *Commercial Bank*, 459.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, 3, 4.

PARTIES.

See EVIDENCE, XII. PLEADING, I.

PARTNERSHIP.

1. Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt due by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception. *Dick* v. *Byrne*, 465.

2. In an action against a partnership for a debt, defendants may compensate by way of exception, a debt due by plaintiff to a member of the partnership individually. *Ibid.*

3. Partnership in *commendam* is not considered by the Civil Code as a distinct species of partnership, but rather as an incident or accessory which may be attached to and incorporated with all kinds of partnerships. The partner

in *commendam* is viewed as a partner only to a certain extent. C. C. 2799, 2810, 2811, 2815. *Marshall* v. *Lambeth*, 471.

4. The liability of a partner in *commendam* closes with the expiration of the partnership, when he may withdraw the funds contributed by him and his share of the profits, subject only to the debts created during its existence. C. C. 2812, 2847. And where the partnership was formed for a limited period, and the contract recorded in the office of the Recorder of Mortgages, no other notice of the dissolution is necessary. *Ibid.*

5. On the dissolution of a partnership in *commendam*, the acting partners have a right, in the liquidation of the partnership, to continue to use the social name. The partner in *commendam* cannot prevent their doing so; nor can the knowledge of the latter that the acting partners continued to use it, subject him to any liability. The presumption upon which liability may be fastened on an ordinary retiring partner who suffers his name to remain as part of the firm, that the partnership was trusted upon his responsibility, does not apply to a partner in *commendam*, whose name cannot appear in that of the partnership, and whose liability, as to amount and duration, is determined by, and may be ascertained from the registry of the contract which the law requires to be made. So long as he does none of those acts which by law impose on him the liabilities of a common partner, no one has a right to look beyond such registry. C. C. 2819, 2820. *Ibid.*

PAYMENT.

1. Plaintiff, the holder of a note, having received from the maker a draft on a parish treasurer, payable on a certain day, but accepted "payable when in funds," wrote a receipt on the back of the note, stating "that the draft when paid will be in full for its amount on the note." The draft had been accepted "payable when in funds," before its delivery to plaintiff, and both parties were aware that the parish treasury was insolvent, and that the time of payment would be uncertain. The draft was not protested at maturity, but was subsequently paid. There was no proof that the treasury was in funds before the note was paid: *Held*, that plaintiff was not bound to protest the draft, as there was no proof that the condition ever happened under which the acceptance was made; and that credit for the amount of the draft should be allowed only from the date of its actual payment.

Harrell v. *Marston*, 34.

2. Satisfaction of a judgment may be proved by presumptions, as well as by positive evidence. The sufficiency of the proof must depend on the circumstances of each case. *Bethany* v. *His Creditors*, 61.

3. The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree

for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied. *Succession of Tilghman*, 387.

4. A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State. *Ibid.*
5. Where a statute declares that a judgment shall be presumed to have been paid, in case no execution be sued out within a certain period after it was rendered, the period must be calculated from the date of the judgment, though anterior to the passage of the act, and though sufficient time have not elapsed since its enactment to establish the presumption if calculated from that time. *Ibid.*
6. Action by a physician for services rendered, and medicines furnished to the deceased. The evidence showed, that the disease for which the latter was treated was incurable, but that a wound received during his illness was the immediate cause of his death: *Held*, that the physician was not entitled to a privilege for the amount of his bill; that such a privilege is allowed only for medicines furnished, and services rendered during the last sickness, (C. C. 3158); and that by the last sickness is meant that of which the patient died. C. C. 3166. *Succession of Whitaker*, 91.

PLEADING.

I. *Parties to Action.*
II. *Actions where to be brought.*
III. *Petition and Amendments thereto.*
IV. *Exceptions, Answer and Oppositions.*
V. *Demands in Reconvention.*
VI. *Intervention.*

I. *Parties to Action.*

1. In every action on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080. *Bird* v. *Doiron*, 181.
2. The heir acquires the succession of the person from whom he inherits immediately after the death of the latter. This right is vested in him by operation of law alone, before he has taken any step to put himself in possession.

One of its effects is to authorize him to institute any action which the deceased had a right to institute, and to prosecute those already commenced. C. C. 934, 935, 936, 939. He cannot be required, in order to authorize him to sue, to show that he has been recognized as heir, and put in possession of the estate by a decree of the Court of Probates of the place where the succession was opened. All that can be required of him is to furnish satisfactory evidence of his right to inherit. The recognition of the heir by the Probate Court is only required where he seeks to compel a curator, executor or administrator to render an account. C. P. 1000, 1001, 1002, 1003.

Le Page v. *Gas Light and Banking Company*, 183.

3. In an action instituted by one held as a slave to establish his right to freedom, the only issue which can be presented is *liber vel non*. Plaintiff cannot contest the title of the defendant but by establishing his own right to freedom. A slave is incapable of appearing in court for any other purpose than that of claiming his freedom. *Lewis* v. *Cartwright*, 186.

4. Where plaintiff, having prayed for an order of seizure and sale against certain property and notified defendant as executor of the mortgagor, subsequently changes the proceedings to those *via ordinaria*, and, representing that defendant is in possession of the mortgaged property, prays that he may be cited and for a judgment against him for the amount of the debt, and in case of his failure to pay, ordering the property to be sold, the judgment should direct the mortgaged property to be sold, unless the defendant pay the mortgage debt. The defendant being cited in the proceedings *via ordinaria*, merely as the actual possessor of the mortgaged premises, no judgment can be rendered against him as executor.

Citizens Bank v. *Buisson*, 506.

5. Corporators may maintain an action against each other relative to the affairs of the corporation, during its existence. *Percy* v. *White*, 513.

II. *Actions where to be brought.*

6. When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996.

Self v. *Morris*, 24.

7. Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it.

Ibid.

8. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. *Per Curiam:* The action should have been before the Probate Court.

Rhodes v. *Union Bank*, 63.

9. All actions pending, and all claims against one who has made a forced sur-

render under the statute of 25 March, 1808, for the relief of insolvent debtors in actual custody, must be removed to, and cumulated in the tribunal before which the insolvent proceedings are pending.

Jacobs v. *Bogart*, 162.

10. A Police Jury is a corporation established for the whole parish, and cannot be sued in any court the territorial jurisdiction of which is limited to a part of the parish, though the Parish Judge, who is *ex officio* president of the jury, and the clerk reside within the limits of its jurisdiction, and though the jury itself meet and keep its records at a place within the jurisdiction of the court. It has no domicil but the parish, and must be sued in a court having jurisdiction over the whole parish. Nor does it make any difference that the work for which the plaintiff seeks remuneration, was done within the territorial jurisdiction of the court.

Berthaud v. *Police Jury of Jefferson*, 550.

III. *Petition and Amendments thereto.*

11. Where, in an action by a minor against her tutor, plaintiff prays that the latter may be ordered to render an account, and to pay her a certain sum, or whatever amount may be found due by him, and defendant renders no account, the plaintiff may prove any sum received by him. C. P. 998. *Per Curiam:* The rule that a general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner in which the sum accrued, is too vague to authorize the admission of proof, the object of which is to prevent the defendant from being taken by surprise, is inapplicable to the case of a tutor called upon to account, who knows what is asked of him; his ward is under no obligation to state the time, place and manner of receiving the sums for which he is accountable.

Aubic v. *Gil*, 50.

12. After a motion to dissolve an injunction, plaintiff cannot, by filing an amended petition containing new allegations, cure a radical defect in his original proceedings, and thereby give effect to an injunction originally illegal.

Rhodes v. *Union Bank*, 63.

13. In an action against the curator to recover an amount due by the deceased, plaintiff alleged that the latter had been very careful in keeping his accounts, and that evidence of her demand would be found on his books, or among his papers: *Held*, that this allegation does not show that the demand was founded on a written contract, nor compel the petitioner to admit the books and papers of the deceased in evidence. *Succession of Segond*, 111.

14. On a prayer for the removal of an administratrix the grounds of the application must be stated that she may have notice thereof.

Succession of Kendrick, 138.

15. A petition may be amended with the leave of court after issue joined, provided such amendment do not alter the substance of the demand. C. P. 419. Leave to amend is in the discretion of the court.

Succession of Rouzan, 436.

16. Where petitioners pray that a will may be set aside, but in case it be sus-

tained, that certain legacies may be delivered to them, on their performance of the conditions imposed by the testator, which they hereby offer to perform, they cannot amend by striking out, or discontinuing their offer to accept the legacies under the conditions imposed by the will. *Ibid.*

IV. *Exceptions, Answer and Oppositions.*

17 Where opposition is made to the account presented by an administratrix, the items objected to must be specified, and the grounds of objection briefly and clearly stated, that she may have full notice thereof.

Succession of Kendrick, 138.

18. Where a creditor who has been placed on the schedule of an insolvent, and made a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal. *Jacobs* v. *Bogart*, 162.

19. Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt due by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception. *Dick* v. *Byrne*, 465.

20. In an action against a partnership for a debt, defendants may compensate by way of exception, a debt due by plaintiff to a member of the partnership individually. *Ibid.*

21. After a dilatory exception had been overruled, defendant filed a paper in these words: "To the judge, &c.; the answer of, &c. says that the action of plaintiff is prescribed, and respondent prays that the petition be dismissed, with costs." *Held*, that this must be considered as an answer to the merits; that though prescription may be set up as an exception, it may also be pleaded as an answer, and that the answer not denying the allegations of the petition, they were properly considered as admitted, and judgment correctly rendered for the plaintiff, without further evidence.

Macarty v. *Bureau*, 467.

22. Pleas of the general issue and prescription are not inconsistent. *Ibid.*

V. *Demands in Reconvention.*

23. Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter. *Succession of Gourjon*, 422.

VI. *Intervention.*

24. Where an intervening party prays for a dissolution of an injunction obtain-

ed by plaintiff, and for interest and damages, the plaintiff cannot, by dismissing his suit, deprive the former of his right to a judgment.

Whittemore v. *Watts*, 10.

POLICE JURY.

1. A police jury has no authority to establish a new road through the lands of an individual without compensating him therefor, unless it be shown that he will derive therefrom something like a commensurate benefit, nor to compel him to make such a road at his own expense. *Per Curiam:* The acts of the Legislature conferring the powers possessed by police juries in relation to public roads (acts of 25 March, 1813, § 5; 22 February, 1817, § 3; 30 January, 1834, §§ 4, 5, &c.) cannot be understood as repealing the articles of the Civil Code relative to the mode of expropriating property, where no other mode of expropriation is pointed out by them. Art. 489, which declares that private property shall not be taken for public use without indemnity, as well as arts. 2604 to 2611, which confirm the same principle and point out the mode of expropriating property when the legislature has not directed otherwise, has a constitutional sanction, and cannot be violated by parochial legislation, nor by that of the State itself.

Police Jury of Jefferson v. *D'Hemecourt*, 509.

2. A police jury is a corporation established for the whole parish, and cannot be sued in any court the territorial jurisdiction of which is limited to a part of the parish, though the Parish Judge, who is *ex officio* president of the jury, and the clerk reside within the limits of its jurisdiction, and though the jury itself meet and keep its records at a place within the jurisdiction of the court. It has no domicil but the parish, and must be sued in a court having jurisdiction over the whole parish. Nor does it make any difference that the work for which the plaintiff seeks remuneration, was done within the territorial jurisdiction of the court.

Berthaud v. *Police Jury of Jefferson*, 550.

See ROADS.

POSSESSION.

1. Action for damages for a trespass committed by defendants on lands possessed by plaintiffs as owners, and defence that the lands belong to the United States, and that defendants entered thereon for the purpose of acquiring a pre-emption right thereto: *Held*, that the title of one possessing as owner cannot be subjected to investigation at the instance of a mere trespasser; and that a party cannot be permitted, under pretext of an intention to purchase from the United States, to assume that land, in the possession of another, is public, and liable to be entered on at pleasure.

Bonis v. *James*, 149.

2. Where in an action to recover certain slaves it is proved that defendant got possession of them illegally and fraudulently, and was the last person seen

in possession of them, they will be presumed to be still in his possession. The burden of proving that he has parted with the possession is on him. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.

PRESCRIPTION.

1. Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: *Held*, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.
Farrar v. *Peyroux*, 92.

2. An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. *Wheat* v. *Union Bank*, 94.

3. Where, through the negligence of an attorney in preparing a *tableau* of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator.
Thompson v. *Lobdell*, 369.

4 An action on a judgment obtained in another State is prescribed only by the lapse of twenty years, where the judgment creditor resides out of this State. C. C. 3508. *Succession of Tilghman*, 387.

5. After a dilatory exception had been overruled, defendant filed a paper in these words: "to the judge, &c.; the answer of, &c. says that the action of plaintiff is prescribed, and respondent prays that the petition be dismissed, with costs." *Held*, that this must be considered as an answer to the merits; that though prescription may be set up as an exception, it may also be pleaded as an answer, and that the answer not denying the allegations of the petition, they were properly considered as admitted, and judgment correctly rendered for the plaintiff without further evidence.
Macarty v. *Bureau*, 467.

6. Pleas of the general issue and prescription are not inconsistent. *Ibid.*

7. An action by the stakeholders against the directors of a bank for damages for losses sustained through their negligence, fraud or mismanagement, is prescribed by ten years from the date of the acts complained of.
Percy v. *White*, 513.

PRESUMPTION.

See EVIDENCE, II.

PRIVILEGE.

1. All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as in case of a *concurso*. C. P. 301, 401, 402, 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a *fi. fa.* by a third person, the latter can acquire no greater right than if he had seized the property itself.

Fulton v. *Her Husband*, 73.

2. So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403. *Willis* v. *Her Husband*, 87.

3. Action by a physician for services rendered, and medicines furnished to the deceased. The evidence showed, that the disease for which the latter was treated was incurable, but that a wound received during his illness, was the immediate cause of his death: *Held*, that the physician was not entitled to a privilege for the amount of his bill; that such a privilege is allowed only for medicines furnished, and services rendered during the last sickness, (C. C. 3158); and that by the last sickness is meant that of which the patient died. C. C. 3166. *Succession of Whitaker*, 91.

PROHIBITION.

Where the facts upon which an application for a prohibition to arrest the proceedings in an action is based, appear from the record of the case itself, they need not be supported by the oath of the applicant.

Berthaud v. *Police Jury of Jefferson*, 550.

QUASI-CONTRACTS.

1. Money paid by the endorser of a bill who had been discharged by the *laches* of the holder, in ignorance of his discharge, may be recovered back. C. C. 2280. There is, on his part, no such natural obligation to pay, as can prevent his recovering the amount. C. C. 2281. *Per Curiam:* His undertaking was, to pay, provided the holder made due demand of the acceptor, and gave him due notice of non-acceptance or non-payment. His obligation was conditional; and when the condition failed, he was under no obligation, either natural or civil to pay.

Heath v. *Commercial Bank*, 334.

2. To reclaim money paid on the ground that it was not due, plaintiff must show not only that it was not due, but that it was paid through error, and that he was under no natural obligation to make such payment. C. C. 1752, 2279, 2280, 2281. C. P. 18. *Hills* v. *Kernion*, 522.

3. Plaintiffs, factors for the sale of tobacco, having paid defendants, tobacco-

inspectors appointed by the State, a certain sum beyond the fees allowed by law, for every hogshead of tobacco inspected by them, reclaimed the amount alleging that it had been illegally extorted by defendants, who had refused to do their duty unless it was paid. It was proved that defendants had given public notice, of their willingness, as individuals, to render certain services not prescribed by law, when requested by the parties interested, on receiving an additional compensation for each hogshead; that plaintiffs knew, when they consented to pay such extra-charge, that it exceeded the amount allowed by law, and was for service which defendants were not required to render as inspectors; that this extra-charge was but a fair remuneration for the additional services, which were beneficial to all interested in the tobacco; and that plaintiffs had always charged this extra compensation to the owners of the tobacco by whom the amount had been paid. There was no proof that the inspectors had ever refused to do their duty unless the extra-charge was paid. *Held*, that equity forbidding that plaintiffs should profit by the labor of the defendants without a fair remuneration, and the consideration for which the extra-compensation was paid not being immoral nor unjust, there was a natural obligation on the part of the plaintiffs to pay, and that no action will lie to recover back the amount. C. C. 1750, 1751, 1752, 2279, 2280, 2281. C. P. 18. *Ibid.*

RECONVENTION.

See PLEADING, V.

REGISTRY.

1. The omission to register a mortgage, cannot be taken advantage of by a purchaser of the mortgaged property, who assumed the payment of the debt secured by mortgage as part of the price. *Noble* v. *Cooper*, 44.
2. No re-inscription of a mortgage is necessary, where the mortgagor has made a surrender of his property and obtained a stay of proceedings. C. C. 3326. *Per Curiam:* The rights of the creditors of an insolvent must be acted on with reference to their situation when his *bilan* was filed, and all proceedings against him stayed. *Bethany* v. *His Creditors*, 61.
3. The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community. *Fortier* v. *Slidell*, 398.

RESCISSION.

See SALE, IV.

ROADS.

1. Proceedings of police juries and juries of freeholders, under the act of 12

March, 1818, relative to public roads, involving questions of police rather than of a judicial character, should be sustained unless manifestly unjust. *Cross* v. *Police Jury of Lafourche Interior*, 121.

2. The second section of the act of 12 March, 1818, which gives the right to any individual dissatisfied with the decision of a jury of freeholders laying out a road through his land, either as to the course of the road, or the damages allowed to him, to appeal to the District Court, does not authorize the appellant, on his single opposition, and without making any other party than the Police Jury, to contest the opening of such road beyond the limits of his own property. Evidence to show that a better route might have been selected beyond his limits, is irrelevant and inadmissible in a proceeding to which the proprietors of the lands, over which the road is to pass are not parties. *Ibid.*
3. Where on an appeal from the decision of a jury of freeholders establishing a road under the act of 12 March, 1818, the jury to whom the case is submitted in the District Court, are of opinion, that another route through the lands of the appellant, indicated by him, is practicable and reasonably convenient to the public, and less injurious to the appellant, they may substitute such route for that selected by the jury of freeholders, and order the road to be made along it. *Per Curiam:* As a general rule the most direct and best route should be selected; but this rule is subject to exceptions, one of which is, that too much injury should not be inflicted on individuals. Where a direct course would cause great damage, the road should approximate to it as near as it can under all the circumstances. *Ibid.*
4. On an appeal from the decision of a jury of freeholders establishing a road through the lands of the appellant, defendants offered in evidence a petition addressed to them by the former, at a previous period, with parol evidence to show the action on it, and the selection by the appellant, of the route to which defendants consented in their answer; *Held*, that the evidence was admissible; and that if there had been any change in the property, or in circumstances, calculated to alter his opinion, it was competent for him to show it, and thereby destroy the effect of the evidence. *Ibid.*
5. On appeal from the decision of a jury of freeholders establishing a road, under the act of 12 March, 1818, the appellant may introduce evidence to prove that a convenient and good road may be laid out through his lands, less injurious than the one proposed by the jury, though such route was not specially indicated in his opposition. So, evidence will be admissible on his part to show, that the construction of the road along another route would cost less than the one designated by the defendants, the law giving to the court and jury to whom the appeal is submitted, a power of revision over the damages as well as the course of the road. *Ibid.*

SALE.

I. *Requisites and Proof of Sale.*
II. *Warranty and Eviction.*

III. *Rights and Obligations of Vendee.*
IV. *Rescission.*
V. *Judicial Sales.*

I. *Requisites and Proof of Sale.*

1. Where an authentic act of sale contains an absolute assumption by the purchaser of a debt due by the vendor to a third person, a paper, signed by the vendor, declaring that the assumption was not an absolute one, will be inadmissible against such third person to disprove the absolute character of the assumption, unless the fact be sworn to. *McMichael* v. *Davidson*, 53.
2. Plaintiff having sold a tract of land before her marriage, received certain notes for the price. The notes matured after her marriage, when, the purchaser being unable to pay, agreed to rescind the sale, and on receiving his notes, reconveyed the property to the plaintiff. She subsequently resold the property to a third person, her husband assisting in the sale, and receiving the price. *Held*, that the re-transfer made to the plaintiff by the first purchaser, cannot be viewed as a purchase made during the marriage; that the land became the property of the petitioner, in the same manner as if the first sale had been judicially rescinded; that she held it by the title she had before her marriage, as though no sale had been made; and that, consequently, it never belonged to the community. *Fulton* v. *Her Husband*, 73.
3. Where a deed of trust requires that public notice shall be given for a certain number of days of any sale made under it, the particular day on which the sale is to take place, must be notified to the public for the time required. If after such notice, the sale be postponed, new notice must be given, for the full time required, of the day to which it is postponed.

Tupper v. *Scott*, 323.

See 20, *infra.*

II. *Warranty and Eviction.*

4. A purchaser of real estate, sued for the price, can only require security against the danger of eviction, where he has reasonable ground for apprehending it. *Hearsey* v. *Riddle*, 22.
5. A purchaser at a judicial sale of property on which there exists a general mortgage, judicial or legal, against whom an action has been commenced, or who has good reason to fear that an action will be commenced against him by the mortgagee, may withhold the price until relieved from such apprehension, or until proper security be given against the danger of eviction. C. P. 710. *Fortier* v. *Slidell*, 398.
6. The vendor of a slave, cited in warranty by his vendee, against whom a judgment is recovered by a third person for the slave and the value of her services from judicial demand, will be responsible to his vendee for the price of the slave with legal interest from the time of such demand, but not for the value of her services from that time, as ascertained by the judgment against his vendee. *Burkett* v. *Layton*, 457.

III. *Rights and Obligations of Vendee.*

7. The omission to register a mortgage, cannot be taken advantage of by a purchaser of the mortgaged property, who assumed the payment of the debt secured by mortgage as part of the price. *Noble* v. *Cooper*, 44.

8. Plaintiff sold defendants a tract of land, for the price of which notes were taken bearing interest, at a certain rate, from date until paid. The land was subject to a mortgage in favor of a third person, and it was stipulated in the act of sale, that the notes should remain with a depositary until the vendor should cause the mortgage to be released, and that the notes should not be payable until such release. It was admitted that the land was capable of producing revenue by being rented. There was no attempt by the purchasers to relieve themselves from interest by depositing the price. *Held*, that the purchasers knowing that the notes were not to be paid until the release of the mortgage, and having consented that interest should run from the date of the contract until payment, the interest must be paid as part of the consideration of the sale. *Erwin* v. *Greene*, 175.

9. Where real estate, capable of producing revenue, is sold for a price payable at a fixed period, and the note of the purchaser is taken for the price, without any stipulation as to interest, but subject to the condition that the note shall remain on deposit, and the payment not be demandable until the vendor shall release a mortgage existing on the property, and the purchaser has possession and enjoyment of the thing sold, legal interest will be due on the price of the property from the time when the principal was payable. C. C. 1933, 2531. Though entitled to suspend the payment of the price until the mortgage be released, the purchaser could only avoid the payment of interest by depositing the price. C. C. 2537. *Ibid.*

10. The rights of an assignee of a deed of trust executed in another State, must be determined by the conditions of the assignment. In proceeding under the deed of trust he must conform to the conditions on which it was assigned to him. *Tupper* v. *Scott*, 323.

11. Where it is stipulated in a notorial act of sale that the purchaser may postpone the payment of a note given by him for the price for a certain time after maturity; on paying interest annually in advance, and the obligor states on the face of the note, which was executed at the same time as the act of sale, that he reserves to himself the right to postpone the payment for the stipulated time, the note and the act must be construed together, and be considered as proving a contract that the principal shall not be exigible until the time to which it was agreed that payment might be postponed, on the payment of interest annually; and the failure of the maker to pay the interest due for any year, will not operate as a forfeiture of the right to delay the payment of the principal, no such penalty being expressed, or implied. The holder of the note has only a right of action, at the commencement of each year, for the interest due. *Bacchus* v. *Moreau*, 539.

See 16, 18, *infra.*

IV. *Rescission.*

12. Action to recover the amount paid to defendants for a treasury note, endorsed by them to plaintiff "without recourse." It was proved that plaintiff paid a premium for the note, and that, after the sale, it was discovered that the note had been redeemed at the Custom House and cancelled, but that it had been afterwards purloined, the word "*cancelled*" which had been written on it, extracted, and the note put into circulation. *Held*, that the sale must be rescinded on account of the error of the purchaser as to the substance of the thing. *Knight* v. *Lanfear*, 172.

13. A judgment creditor cannot treat a conveyance made by his debtor as null and seize the property so conveyed, in the possession of a third person. If the conveyance be illegal or void, he must sue such third person to annul it. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.

14. Defendants sold to a third person, who occupied a building leased from plaintiff, certain boxes of merchandize, for the price of which the purchaser gave his note payable thirty days after date. The merchandize was delivered to the purchaser, and placed in his shop in the building leased from plaintiff. Two or three days after the sale, the purchaser absconded; but, on the eve of his departure, wrote to a third person to deliver the merchandize to defendant, and to get back the note given for the price. Defendant took the merchandize from the store of the purchaser and gave up his note, and resold the merchandize. In an action by the landlord against defendant to recover the value of the merchandize thus removed from the premises: *Held*, that the parties were in a condition to rescind the previous sale, and that defendant was not liable to plaintiff for the value of the merchandize. *Walden* v. *Parrish*, 245.

15. The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendee the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the usufruct, or retains the possession by a precarious title. C. C. 2456.
Merritt v. *Burgess*, 434.

V. *Judicial Sales.*

16. The statement by a sheriff in an act of sale, that the property is sold subject to a general mortgage made in compliance with the provision of the Code of Practice, art. 693, § 6, can impose no obligation on the purchaser to which he is not subjected by law. *Per Curiam:* A sheriff has no authority of his own to impose any burden on a purchaser beyond the provisions of the law. Purchasers at sales under execution, are not personally bound for anterior general mortgages existing on the property purchased by them. They are only liable to an hypothecary action. C. P. 679, 683, 693, 710.
Fortier v. *Slidell*, 398.

17. Where a purchaser at a judicial sale refuses to pay the amount of a special mortgage, which formed a part of the price and had been left in his hands at the time of the sale, on the ground of the danger of eviction, and the pro-

perty is resold at the suit of the special mortgagee, the first sale becomes null and void. *Ibid.*

18. The Code of Practice does not provide for the erasure of mortgages subsequent or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgagees to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue. *Ibid.*

19. No adjudication can be made of property subject to special mortgages of an older date than that of the mortgagee at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684. *Hills* v. *Jacobs*, 406.

20. Where a bidder for property offered for sale at the suit of a mortgagee refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid. *Ibid.*

21. A police jury has no authority to establish a new road through the lands of an individual without compensating him therefor, unless it be shown that he will derive therefrom something like a commensurate benefit, nor to compel him to make such a road at his own expense. *Per Curiam:* The acts of the Legislature conferring the powers possessed by police juries in relation to public roads (acts of 25 March, 1813, § 5; 22 February, 1817, § 3; 30 January, 1834, §§ 4, 5, &c.) cannot be understood as repealing the articles of the Civil Code relative to the mode of expropriating property, where no other mode of expropriation is pointed out by them. Art. 489, which declares that private property shall not be taken for public use without indemnity, as well as arts. 2604 to 2611, which confirm the same principle and point out the mode of expropriating property when the legislature has not directed otherwise, has a constitutional sanction, and cannot be violated by parochial legislation, nor by that of the State itself.

Police Jury of Jefferson v. *D'Hemecourt*, 509.

See 5, *supra*.

SEQUESTRATION.

1. The surety in a sequestration bond cannot be made responsible for any injury to the property sequestered, prior to the date of the bond.

McMichael v. *Gillispie*, 13.

2. A sheriff while he retains possession of sequestered property, is bound to take proper care of it, and to administer it as a prudent father of a family would administer his own affairs; and he is entitled to a just compensation therefor, to be determined by the court. C. P. 283. C. C. 2949, 2950. Where slaves are sequestered he is authorized to make the disbursements necessary for their preservation, and to put them in a place of safety, (C. P. 659, 661); but he cannot hire them out unless expressly authorized by the court, with the consent of both parties. C. P. 662.

Parkison v. *Boyle*, 82.

SHERIFF.

1. One who intends to commence an action against the sheriff of a parish in which there is no coroner, must provoke the appointment of one, the coroner alone having authority to serve process on the sheriff.

Jacobs v. *Ducros*, 115.

2. A sheriff who pays over money in violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.

Randall v. *Parkison*, 134.

3. Bonds received by a sheriff in his official capacity should, on his ceasing to act as such, be delivered to his successor. *Simpson* v. *Allain*, 500.

See SEQUESTRATION, 2.

SHIPPING.

See CARRIERS. EVIDENCE, 23.

SLAVE.

In an action instituted by one held as a slave to establish his right to freedom, the only issue which can be presented is *liber vel non*. Plaintiff cannot contest the title of the defendant but by establishing his own right to freedom. A slave is incapable of appearing in court for any other purpose than that of claiming his freedom. *Lewis* v. *Cartwright*, 186.

STATEMENT OF FACTS.

See APPEAL, 12, 13.

STATUTES CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*

II. *Statutes of the State.*

III. *Statutes of Alabama.*

I. *Statutes of the United States.*

1799, March 2, § 65. Duties on imports and tonnage. *Toole* v. *Durand*, 363.
1812, April 8, § 1. Admitting Louisiana into the Union. *State* v. *Fullerton*, 210.

II. *Statutes of the State.*

1808, March 25. Relief of Insolvent Debtors in actual custody. *Jacobs* v. *Bogart*, 162.
——— 31, § 5. Attorneys at Law. *Thompson* v. *Lobdell*, 369.
1813, February 10, § 21. Attorney General. *State* v. *Williams*, 252.
—— March 25, § 5. Police Jury. *Police Jury of Jefferson* v. *D'Hemecourt*, 509.
——— 28, § 8. Fees of Notaries. *State* v. *Atchafalaya Railroad and Banking Company*, 198.
1816, March 20. Inspection of Tobacco. *Hills* v. *Kernion*, 522.
1817, January 29, § 1. Importation of Slaves from other States. *State* v. *Williams*, 252.
1817, February 20. Voluntary Surrender of Property. *Jacobs* v. *Bogart*, 162.
——— 22, § 3. Police Jury. *Police Jury of Jefferson* v. *D'Hemecourt*, 509.
1818, March 6, § 2. Inspection of Tobacco. *Hills* v. *Kernion*, 522.
——— 12. Roads. *Cross* v. *Police Jury of Lafourche Interior*, 121.
——— 19, § 10. Punishment of persons failing to pay fines. *State* v. *Williams*, 252.
1819, March, 6, § 1. Inspection of Tobacco. *Hills* v. *Kernion*, 522.
1820, —— 17. Relief of debtors confined in jail. *Ex parte Powell*, 241.
1823, —— 27, § 2. Competency of Witnesses. *Dupeux* v. *His Creditors*, 242. *Macarty* v. *Roach*, 357.
1826, —— 16, § 14. City Court of New Orleans. *Jacobs* v. *Ducros*, 115.
1827, —— 13. Protest of Bills and Notes. *Carmena* v. *Doherty*, 57. *Union Bank* v. *Penn*, 79. *Palmer* v. *Lee*, 537.
1830, —— 15, § 10. Mortgage on real estate of sheriffs and tax collectors. *Cain* v. *Bouligny*, 159.
1832, —— 16. Criminal Court of First District. *State* v. *Williams*, 252.
—— April 2, § 8. Prosecutions by Indictment or Information. *Ibid.*
1833, —— 1, § 33. Charter of Commercial Bank of New Orleans. *Gerl* v. *Commercial Bank*, 188.
——— § 24. Charter of Citizens Bank of Louisiana. *Citizens Bank* v. *Buisson*, 506.
1834, January 30, §§ 4, 5. Police Jury of Jefferson. *Police Jury of Jefferson* v. *D'Hemecourt*, 509.
1835, April 2. City Court of Lafayette. *Cain* v. *Bouligny*, 159. *Berthaud* v. *Police Jury of Jefferson*, 550.
1837, March 13. Voluntary Surrender and Settlement of Successions. *Jacobs* v. *Bogart*, 162.
——— § 3. *Succession of Peytavin*, 477.
——— §§ 6, 7. *Succession of Williams*, 46.

1839, March 20, § 13. Interrogatories to Third Persons under a *fi. fa.* *Simpson* v. *Allain*, 500.
———————— § 20. Surety on Appeal Bond. *Saulet* v. *Trepagnier*, 227.
———————— Clinton and Port Hudson Railroad Company. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.
1840, ——— 28, §§ 5, 6. Insolvent debtors. *Ex parte Powell*, 241.
——— April 2. City Court of Lafayette. *Berthaud* v. *Police Jury of Jefferson*, 550.
1841, February 10, § 10. Seizures by sheriffs in parish of Orleans. *Simpson* v. *Allain*, 500.
———————— § 17. Juries in Courts in New Orleans. *Daniels* v. *Andrews*, 160.
——— March 8. Clinton and Port Hudson Railroad Company. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.
———————— Prosecutions in Criminal Court of First District. *State* v. *Williams*, 252.
1842, February 5, § 3. Reviving charters of banks in New Orleans. *Planché* v. *Roy*, 453.
——— March 14, §§ 12, 13. Liquidation of banks. *State* v. *Atchafalaya Railroad and Banking Company*, 198.
———————— 16. Successions. *Succession of Hart*, 534.
———————— 26. Clinton and Port Hudson Railroad Company. *Drummond* v. *Commissioners of Clinton and Port Hudson Railroad Company*, 234.
1843, March 27. Providing for support of the Charity Hospital. *State* v. *Fullerton*, 210.
——— April 5, § 1. City Court of Lafayette. *Berthaud* v. *Police Jury of Jefferson*, 550.
1844, February 19. Amending art. 2304 of Civil Code respecting offences and quasi-offences. *Villeré* v. *Græter*, 203.

III. *Statutes of Alabama.*

1835, January 10, §§ 3, 4. Execution of Judgments. *Succession of Tilghman*, 387.

SUBROGATION.

See MORTGAGE, 11.

SUCCESSIONS.

I. *Jurisdiction in Matters of Succession.*
II. *Executors and Administrator.*
III. *Claims against Successions.*

IV. *Sale of Property of Successions.*
V. *Heirs and Legatees.*

I. *Jurisdiction in Matters of Succession.*

1. When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996.
Self v. *Morris*, 24.

2. Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it.
Ibid.

3. District Courts have jurisdiction of an action by heirs to compel the transfer to them of stock owned by the deceased where there are no debts due by the succession. *Per Curiam:* Such a case is not one of those enumerated in arts. 924, 925 of the Code of Practice as coming exclusively under the power and jurisdiction of Courts of Probate, which being of limited and special jurisdiction cannot take cognizance of matters which, though relating to a succession, are not placed by law under their immediate control and jurisdiction. *Le Page* v. *Gas Light and Banking Company*, 183.

II. *Executors and Administrators.*

4. A natural tutor is entitled to administer the property of his children without giving security, (C. C. 327, 330); but he cannot administer upon a succession opened in their favor, without having been appointed administrator, and giving security as any other individual. C. C. 1037. It is only after such an appointment that he can be considered as the representative of the succession, and be sued as such in the Court of Probates for the debts due by the estate. *Self* v. *Morris*, 24.

5. Any creditor of a succession administered under the supervision of a Court of Probates, may, at any time, compel the administrator to render a full and perfect account showing the true situation of the succession, and to make a distribution of the funds in his hands, according to a *tableau* of distribution, to be homologated by the court, after due notice to all the creditors. C. C. 1056 to 1058, 1167 to 1170. C. P. 1053 to 1055. Act 13 March, 1837, § 6, 7. *Succession of Williams*, 46.

6. An account rendered by an administrator of a succession cannot be homologated *ex parte*. It must be submitted to the court contradictorily with all the creditors. *Ibid.*

7. An administrator is entitled to credit for payments made by him to creditors of the succession, though without authority from the Court of Probates, where the sums paid do not exceed the amounts which the creditors were entitled to receive. *Ibid.*

8. The account rendered by an administratrix should show that everything on the inventory has been sold or otherwise accounted for, or it should not be homologated. *Succession of Kendrick*, 138.

9. Notice to the parties interested must be given before any order can be made homologating a *tableau* of distribution filed by an administratrix, and directing the debts of the succession to be paid conformably thereto. *Ibid.*

10. A prayer for the removal of an administratrix, presented for the first time on an application for a new trial, after judgment overruling an opposition to an account filed by her, is too late. To notice such a prayer on appeal, no issue thereon having been made or tried below, would be to assume original jurisdiction. *Ibid.*

11. Where opposition is made to the account presented by an administratrix, the items objected to must be specified, and the grounds of objection briefly and clearly stated, that she may have full notice thereof. *Ibid.*

12. On a prayer for the removal of an administratrix the grounds of the application must be stated that she may have notice thereof. *Ibid.*

13. Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter. *Succession of Gourjon*, 422.

14. The fact that one named as an executor has become a bankrupt since the death of the testator, and before his application to be recognized as such, does not disqualify him. *Per Curiam:* The law (C. C. art. 1150) contemplates a change in the condition of the executor, after he shall have entered on the discharge of his duties, by becoming a bankrupt, as good ground for removal; but it does not follow that he becomes legally disqualified for a future appointment, by such a change. *Ibid.*

15. The third section of the stat. of 13 March, 1837, which makes it the duty of executors, &c. "to deposit all moneys collected by them, as soon as the same shall come into their hands, in one of the chartered banks of this State, or in one of their branches, allowing interest on deposits, if there be one in the parish, &c., and on no account to remove said deposit or any part thereof, until a *tableau* of distribution is homologated, or unless ordered by a competent court, &c.," under the penalty of being condemned to pay for the use of the estate twenty per cent per annum interest on the amount not so deposited, or withdrawn without order, besides all special damage, and of dismissal from office, being highly penal, must be rigidly construed. Where there is no bank in the parish in which the executors reside and the succession is under administration, paying interest on deposits, the executors are not bound to deposit the funds, the object of the law being not so much the safety of the funds, as the rendering of them productive.

Succession of Peytavin, 477.

16. In proceedings against an executor to render him personally liable for debts

due to the succession in consequence of alleged neglect, it is for him to exonerate himself by showing reasonable diligence. *Ibid.*

17. The mere fact of not bringing suit to recover a debt due to the succession is not conclusive proof of want of due diligence on the part of the executor. *Ibid.*

18. Petition for the removal of an administratrix for failing to comply with the 5th sect. of the stat. of 16 March, 1842, which provides that "whenever the testamentary executor or other administrator of a succession shall suffer ten days to elapse after his confirmation or appointment, without having either qualified, or caused an inventory to be at least begun, the Judge shall forthwith and *ex officio* appoint a successor." The judgment appointing the administratrix was signed on the 25 September, and on the 6 October, she was sworn, and obtained an order for an inventory. On the 11th of October petitioner applied for her removal. *Held*, that not having qualified before or on the 5th of October, when the ten days expired, the Judge might in his discretion, have afterwards refused to allow her to do so, but that having permitted her to take the oath on the 6th, it was too late afterwards to object that she had not qualified sooner; and that the statute does not require that both the oath should be taken and the inventory begun within the ten days. *Succession of Hart*, 534.

III. *Claims against Successions.*

19. Where presumptive heirs remain in possession of an estate, without having accepted it or made an inventory, persons holding claims against it must cite them to declare whether they accept or renounce the succession. C. C. 1029. If they declare that they accept, or are silent, or make default, they shall be considered to have accepted as unconditional heirs, and may be sued as such, (C. C. 1030); but this provision does not apply to minors, who cannot accept an inheritance purely and simply. If the heirs of age declare that they wish to take the benefit of inventory, and to have delay for deliberating, or if the heirs are minors, who cannot accept otherwise, the judge must cause an inventory to be made, and appoint an administrator to manage the property. C. C. 1031, 1032, 1034 to 1040. The administrator thus appointed has the same powers, and is subject to the same duties and liabilities, as the curator of a vacant estate. C. C. 1042. C. P. 992, 994. If, after the expiration of the delay for deliberating, the heirs declare that they are not willing to accept the succession but with the benefit of inventory, the administrator shall proceed to liquidate and settle the affairs of the succession, and the balance, after the payment of the debts, will belong to the heirs. C. C. 1051. *Self* v. *Morris*, 24.

20. A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died *pendente lite*, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is *prima facie* evidence

against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, s. 1. C. P. 122. *Per Curiam:* We are not prepared to say, that it is conclusive against the heirs or executor here.

Tait v. *Lewis*, 206.

21. Although the distinct interest of the wife, or of her representatives, attaches at the time of the dissolution of the marriage, subject to the right to renounce and be exonerated from the payment of the community debts, they can claim nothing from the community until such debts are paid. No action can be maintained by them for the half of the price of any specific property acquired during the marriage, where it is not shown, by a liquidation of the community, that there are any gains to be divided. *Fortier* v. *Slidell*, 398.

See 1, 2, 5, *supra*. 28, *infra*.

IV. *Sale of Property of Successions.*

22. Lands belonging to a succession, though situated in another parish, may be sold by the probate judge of the parish in which the succession is opened.

Chaney v. *Gray*, 144.

V. *Heirs and Legatees.*

23. As a succession opened in favor of minors can be accepted for them only with benefit of inventory, it cannot be said to be their property, and does not legally come into their possession, until it has been duly administered, when, whatever may remain after the payment of debts, will fall under the administration of their tutor. C. C. 1051. Arts. 327 and 330 of the Civil Code provide only for the administration of the separate and exclusive property of minors, in which no other person is interested. *Self* v. *Morris*, 24.

24. Where a debtor of a succession becomes entitled to the succession by inheritance from the heir, his debt will be extinguished by confusion only to the amount remaining after the payment of all the debts of the estate. C. C. 2214. If the debts are unpaid, the executor may recover from the debtor the amount necessary to pay them: or if they have been discharged by advances made by the executor, he may recover from the debtor the amount of such advances, the debt of the latter being extinguished only to the amount coming to him from the succession after the payment of all its debts.

Brunetti v. *Barnabé*, 117.

25. An attorney in fact appointed by the natural tutrix of minor heirs residing abroad, cannot represent the heirs in the settlement of the succession of their father, opened in this State, where the property left by the deceased was held in community, and the natural tutrix as surviving spouse, has rights which must be exercised contradictorily with the minor heirs. In such a case, an attorney must be appointed to represent the absent heirs. C. C. 1654. *Per Curiam:* If the natural tutrix were present, having rights to exercise contradictorily with the minor heirs she could not represent them; an under-tutor alone could act for them. C. C. 301.

Succession of De Lizardi, 167.

26. The heir acquires the succession of the person from whom he inherits immediately after the death of the latter. This right is vested in him by operation of law alone, before he has taken any step to put himself in possession. One of its effects is to authorize him to institute any action which the deceased had a right to institute, and to prosecute those already commenced. C. C. 934, 935, 936, 939. He cannot be required, in order to authorize him to sue, to show that he has been recognized as heir, and put in possession of the estate by a decree of the Court of Probates of the place where the succession was opened. All that can be required of him is to furnish satisfactory evidence of his right to inherit. The recognition of the heir by the Probate Court is only required where he seeks to compel a curator, executor or administrator to render an account. C. P. 1000, 1001, 1002, 1003.

Le Page v. *Gas Light and Banking Company*, 183.

27. Where the remainder of an inheritance, after deducting the amounts received by some of the children from their father as an advance upon their hereditary shares in his succession, but not declared to be an advantage or extra-portion, is not sufficient for the legitimate portion of the other children, including in the estate of the deceased the property which the children who have received such advance would have collated had they become heirs, the latter, though they have renounced the succession, will be obliged to collate to the amount necessary to complete such legitimate portion. C. C. 1315. The fact that the other heirs have accepted the succession with the benefit of inventory, does not affect their right to claim such collation. Had they accepted unconditionally they would have become personally liable to the creditors of the succession, to whose advantage alone the collation would have enured. The obligation to collate is founded on the equality which should prevail among heirs called upon to divide the succession of their father, mother, or other ascendant, and on the presumption that whatever has been given to a part of them was so given as an advance upon what they might one day expect from the succession of the donor. C. C. 1307, 1309, 1312, 1313, 1491, 1735. *Grandchamps* v. *Delpeuch*, 429.

28. Where a father, who while solvent, had made advances to some of his children upon their hereditary shares in his succession but not as extra-portions, dies insolvent, his estate, so far as his forced heirs are concerned, must be considered as consisting only of the advances so made, and the disposable portion must be calculated on their amount. But the creditors of the deceased have no right to look to such advances for the payment of their claims as the amounts so advanced did not belong to their debtor at the time of his death. *Ibid.*

29. Where some of the children who had received advances from their father upon their hereditary shares in his succession not made as extra-portions, and who subsequently renounced his succession, are compelled to collate in order to make up the legitimate portion of the other children, they can claim only the disposable portion. Having renounced the succession, they can claim no share in the balance remaining after deducting such disposable portion. *Ibid.*

30. Where property acquired under a will executed in another State is brought by the legatee into this State, where he dies, it must descend according to the laws of this State. The right of inheriting property situated here cannot be governed by the laws of another State, though originally acquired and brought from that State. *Penny* v. *Christmas*, 481.

See 3, 19, *supra*.

SUMMARY PROCEEDINGS.

The widow and heirs of a surety on an appeal bond cannot be proceeded against in the same manner as the surety himself may be, under the 20th sect. of the act of 20 March, 1839, amending art. 596 of the Code of Practice. In authorizing the summary remedy provided by that act, the legislature contemplated no other proceedings than those against the surety himself. *Saulet* v. *Trepagnier*, 227.

SUPREME COURT OF THE UNITED STATES.

On a question as to the constitutional authority of Congress, and the consequent restriction upon the power of State Legislatures, a decision of the Supreme Court of the United States must be regarded as settling the law.
State v. *Fullerton—Re-hearing*, 219.

SURETY.

1. The surety in a sequestration bond cannot be made responsible for any injury to the property sequestered, prior to the date of the bond.
McMichael v. *Gillispie*, 13.

2. Action against defendants, who had guarantied plaintiffs against any loss they might sustain as sureties on bonds for the payment of duties, to recover the amount of certain bonds which they had been compelled to pay, with interest. *Held*, that plaintiffs were entitled to recover the amount of the bonds paid by them, with interest thereon at six per cent from the time of such payment. Act of Congress of 2 March, 1799, § 65.
Toole v. *Durand*, 363.

See SEQUESTRATION, 1. SUMMARY PROCEEDINGS.

TAX.

The statute of 27 March, 1843, providing a fund for the support of the Charity Hospital of New Orleans directs the masters of vessels and steamboats arriving at the city of New Orleans to collect, and pay to the collector appointed by the Charity Hospital, the tax imposed by that act on every passenger on the vessel or steamboat, under his command, and authorizes the masters of such vessel or steamboat, in case any passenger shall refuse to pay said tax, to detain and sell a sufficient proportion of his or her baggage for the payment thereof. The statute imposes no penalty on the master of any

such vessel or steamboat for refusing to collect or pay over such tax. In an action against the master of a steamboat to recover the amount of the tax imposed on passengers arriving on his boat during a certain period, which he had refused to collect: *Held*, that the tax being imposed exclusively on passengers, and not on the captain, officers or crew of the vessel whose labor is necessary for navigating it, and who may be regarded as among the instruments of commerce, cannot be regarded as a regulation of commerce; that the enactments of this statute cannot be said to be an usurpation of the power to "regulate commerce with foreign nations and among the several States" exclusively vested in Congress by the constitution of the United States, (art. 1, § 8); that its provisions are not inconsistent with any law of Congress regulating commerce; nor is the imposition of such a tax prohibited by the first section of the act of Congress of 8 April, 1812, which provides as a condition upon which the State may be admitted into the Union, that the navigable waters leading into the Gulf of Mexico shall be common highways and forever free to all the inhabitants of the Union, without any tax, duty, toll or impost therefor, imposed by the said State, that act having no further application since the admission of Louisiana into the Union; but that the statute, not having imposed any penalty on the master for refusing to collect the tax, the court cannot supply the omission, and condemn him to pay the tax as a penalty for not having complied with the statute by collecting it from his passengers.

State v. *Fullerton*, 210.

TESTAMENT.

See DONATIONS MORTIS CAUSA.

TUTOR.

See MINOR.

TRUST, DEED OF.

1. In the State of Mississippi, in which the common law prevails, a debtor, though insolvent, may, by a deed of trust, grant a preference to a part of his creditors; and, having a right to determine which of them shall be paid, he may dictate the terms of payment. *Layson* v. *Rowan*, 1.
2. In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud. *Ibid.*
3. The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent. *Ibid.*
4. A debt to secure which a deed of trust has been executed, may be describ-

ed by the name of the debtor, and its amount be left to be ascertained. *Id certum est, quod certum reddi potest. Ibid.*

5. It is no objection to the validity of a deed of trust under the common law, that the *cestui que trust* is not a party to the deed, nor that the trustee is not a creditor of the debtor who executed it. *Ibid.*
6. The rights of an assignee of a deed of trust executed in another State, must be determined by the conditions of the assignment. In proceeding under the deed of trust he must conform to the conditions on which it was assigned to him. *Tupper* v. *Scott*, 323.
7. Where a deed of trust requires that public notice shall be given for a certain number of days of any sale made under it, the particular day on which the sale is to take place, must be notified to the public for the time required. If, after such notice, the sale be postponed, new notice must be given, for the full time required, of the day to which it is postponed. *Ibid.*

WARRANTY.

See SALE, II.

END OF VOLUME VII.

ERRATA.

Page	50	line	3 from top for	*Meyrick*	substitute *Merrick.*
"	234	"	9 " " "	annul *to*	" annul *it.*
"	410	"	2 from bottom for	*present term*	" *October term* 1844.
"	453	"	18 from top for	*every*	" *any.*
"	"	"	20 " " "	*it*	" *the debt.*
"	465	"	10 from bottom insert *due* after *debt.*		
"	523	"	17 " top for R. R. substitute R. H.		